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Beyond the Adversarial System: The Evolution of a Peaceful and Productive Approach to Conflict Resolution

by

Dale Jeffrey Dewhurst ©

A thesis submitted to the Faculty
of Graduate Studies and Research
in partial fulfillment of the requirements
for the Degree of Master of Laws

Faculty of Law

Edmonton, Alberta
Fall 1995

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "Beyond the Adversarial System: The Evolution of a Peaceful and Productive Approach to Conflict Resolution" by Dale Jeffrey Dewhurst in partial fulfilment of the requirements for the degree of Master of Laws.

Asst. Professor Annalise E. Acorn

Richard W. Bauman

Assoc. Professor Richard W. Bauman

Professor Roger A. Shiner

Dated Oct 2, 1995

I dedicate this thesis to my mother Doris M. Dewhurst and to the memory of my father Frederick A. Dewhurst. The integrity with which they have lived their lives, and the respect and concern they have always shown for others, has helped me to see that the world can be a better place when those who share it choose to co-operate.

I also dedicate this thesis, with love, to my wife, Ann Marie. She has helped to deepen my understanding and the value I place upon other viewpoints. She has challenged and enabled me to grow in ways that would have been impossible without her. Her encouragement and support have made this dissertation possible.

Abstract

A consequence of the adversarial justice system is that people who possess values outside the norm are disempowered. The disempowerment occurs because final responsibility for resolving conflict resides with third persons. A productive approach to conflict recognizes the inherent worth of all individuals and enables them to personally deal with the full dynamics of conflict in a manner that fosters peace and growth in their relationships and in their person. The productive approach is based on dynamics which balance subjective, relational and objective elements. Coercion, where it exists, is used to enhance co-operation and avert adversarialism. As the adversarial partisanship of the present system is structurally incompatible with this threefold dynamic, it is necessary, and desirable, to create a justice system based on core elements which are co-operative, rather than adversarial.

Acknowledgement

I wish to thank my supervisor, Assistant Professor Annalise Acorn, for her advice and support in the completion of this thesis.

I also wish to thank the McDermid Law Fund for choosing me as the recipient of the Honourable N.D. McDermid Graduate Scholarship in Law. The financial assistance provided is greatly appreciated.

TABLE OF CONTENTS

Chapter One: Evolution of the Adversarial System of Justice and the Search for Peaceful and Productive Conflict Resolution 1

1. Concerns With an Adversarial Approach to Conflict Resolution 1
2. Exploring The Possibility of a More Peaceful and Productive Approach to Conflict Resolution 6

Chapter Two: The Conceptual Framework for Peaceful and Productive Conflict Resolution 14

1. The Need to Clarify the Conceptual Framework 14
2. Defining Dissension, Dispute, and Conflict 15
3. Examining the Destructive and Productive Views of Conflict 20
    - 3.1. Conceptual Underpinnings 20
    - 3.2. The Productive Conflict View 23
    - 3.3. The Destructive Conflict View 26
    - 3.4 Power Dynamics in Productive and Destructive Conflict Resolution 28
4. Distinguishing the Position Based Approach from the Interest Based Approach 31
5. Productive Conflict Resolution as *an* Approach not *the* Answer 37

Chapter Three: An Enabling Philosophy for Individuals and Society in Conflict 38

1. An Enablement Philosophy 38
2. Individual, Social and Relational Impact Upon Individual Goals 40
3. Relational Autonomy in the Productive Approach 44
4. The Harm Principle 51
5. The Misleading Nature of a Focus on the Public/Private Distinction 52
6. The Principle of Fallibility 58
7. Truth, Facts and Reason in the Productive Approach 62
8. Rights in the Productive Approach 63
9. Justice in the Productive Approach 66
10. Government and Justice System Obligations to Further the Evolution of Productive Conflict Resolution 70

Chapter Four: Evolving a Peaceful and Productive Conflict Resolution System Through Adversarial Paths 79

1. The Adversarial System and the Principle of Partisanship 79
2. Traditional Justifications for the Principle of Partisanship and Their Implications 84
3. The Adapted Prisoner's Dilemma Analogy 99
4. Getting Unstuck, Options for Evolution 111

Chapter Five: Evolving a Peaceful and Productive Conflict Resolution System Through Alternate Paths 113

1. Enhancing the Skills of Negotiation 113
2. How the Retention of an Adversarial Backdrop Taints Productive Evolution 119
3. Responding to Possible Problems With a Mandatory Productive Approach 122
    3.1 The Distributional Bargaining Problem 122
    3.2 Minimizing the Threat of a New Process 126
    3.3 The Problem of Injustice Through Lack of Consistency and Lack of Guiding Precedent 131
    3.4 Problems of Power Imbalances and Abusive Relationships 139
    3.5 Comparing Open and Closed Justice Forums - The Problem of Prejudice 148
    3.6 The Capacity of the Productive Approach to Deal With Emotions Such as Anger 155

Chapter Six: Conclusion 158

Bibliography 161

CHAPTER ONE:

Evolution of the Adversarial System of Justice and the Search for Peaceful and Productive Conflict Resolution

1. Concerns With an Adversarial Approach to Conflict Resolution

A currently concern with the adversarial justice system is that people who hold divergent views or possess values that differ from the norm cannot always find justice within an adversarial framework. They are disempowered in a system that takes away final responsibility for resolving their disputes and places it in the hands of third persons. No matter how well-meaning and skilful justice system professionals may be, they can never be more than outsiders to individuals' conflicts. Providing individuals in conflict with equal recourse to the adversarial system may be insufficient, as merely entering an adversarial forum may be an affront to dearly held values.

A consequence of this external focus is that open discussion about what the system ought to accomplish for the individual does not take place. This shift in focus from talking about people's needs to talking about system's needs is demonstrated in a passage written by M.A. Eisenberg:

> "Complex societies characteristically need an institution that can conclusively resolve disputes deriving from a claim of right based on the application, meaning, and implications of the society's

existing standards."[1]

However, Eisenberg may not be totally accurate. In the development of the adversarial system what people needed was an escape from violence and a peaceable and productive way to pursue their individual needs and interests. Development of an institution is not the primary need. Rather, it is, and ought to be seen as, an instrumental need.

Eisenberg's statement also interprets disputes as rights-based. The rights to be asserted must derive their justification through existing societal standards. However, as noted in Carter's work[2], it is more likely that disputes were due to conflict over competing customary societal values. If this is so, then trying to resolve disputes with the authority of societal values engages one in circular reasoning, for it is the incompatibility of specific societal values themselves that may well underlie the conflict.

If an individual's needs or values are different than the majority's, then the individual will not have meaningful recourse in a dispute resolution forum that requires justification based on existing societal standards. This is because the *prima facie* assumption tends toward the idea that *different* approaches and values are *wrong* approaches and values. The adversarial system cannot be a system which promotes justice for all as long as it is based only upon the values of some. For those who hold differing values: the adversarial system may be unsuitable because of the care and relational values they hold and their belief that conflict is a problem of relationships and responsibility rather than a question of competing rights;[3] it may be inappropriate due to cultural values which view conflict resolution through the courts as shameful and deserving of scorn;[4] or, for yet others, it may be unsatisfactory because it fails to approach conflict in a manner that will foster mutual understanding of their different interests and beliefs.[5] Whatever the reason, for these people and others, the system is often incongruent with the way they wish to solve problems in their lives.

---

[1] Eisenberg, *supra*, note 25 at 4. I refer to Prof. Eisenberg's work as an example of modern thought on the nature of the adversarial system. I make no claim to provide a critical analysis of his work or thought as a whole.

[2] James Coolidge Carter, *Law: Its Origin Growth and Function, Being a Course of Lectures Prepared for Delivery Before the Law School of Harvard University* (New York: G.P. Putnam's Sons, 1907), lecture 1-2.

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[3] See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982) especially chapter 2; and at 30 where she describes the different responses of a boy, Jake, and a girl, Amy, faced with the dilemma of whether a man should steal a drug to save his wife's life. She writes: "[For Amy] the central tenet of nonviolent conflict resolution, and her belief in the restorative activity of care, lead her to see the actors in the dilemma arrayed not as opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend." And at 100 Gilligan writes: "The moral imperative that emerges repeatedly in interviews with women is an injunction to care, a responsibility to discern and alleviate the 'real and recognizable trouble' of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfilment."

[4] Lynn Berat, "The Role of Conciliation in the Japanese Legal System" (1992) 8 *The American University Journal of International Law and Policy* 125 at 150; and see Rene David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3d ed. (London: Stevens, 1985) at 538, 542-43. David and Brierley write, at 542: "Still essential for the Japanese are the rules of behaviour ... A person who does not observe these rules is seeking his own interest rather than obeying the nobler part of his nature; he brings scorn upon himself and his family."

[5] Valerie Kerruish, *Jurisprudence as Ideology* (London: Routledge, 1991). At p. 17 Kerruish relates the story of the Australian Aborigines who were trying to prevent a pipeline from being run through their sacred brook. When negotiations broke down the Aborigines were forced to obtain an injunction through the courts to prevent the construction of the pipeline. Despite their success in court the Aborigines believed they had been defeated. They believed that it would have been a victory only if they could have negotiated an agreement with the other party.

Take for example the lesbian couple who wish to adopt a child. If the customary societal values hold that homosexuality is improper and that children should be raised by parents of opposite sexes, then the societal values themselves are at odds with the desires of the women. The essence of the women's conflict turns on the divergence between the societal standards and their personal values as lesbians. Asking the women to settle their claims based on rights derived from existing societal standards is effectively asking them to abandon their claims. Further, by not attempting to incorporate the lesbians' values, "society" makes them outsiders even though they play no less a role in society than any other individual couple. However, if the source of law is seen as having an internal component, then the conflict can be addressed at the underlying level of needs and interests with the lesbian women's desires being given due consideration in structuring a solution to the conflict.

It must be recognized that there is a difference between saying that society needs a permanent arbitrator, recognized adversarial procedure, and conclusive dispute resolution to adjudicate competing claims of right; and

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For what they wanted was "such mutuality of understanding as would have led the planners to respect their beliefs and so accept that the pipe should go over and not through the brook."

saying that people should be enabled to resolve their disputes peaceably and productively. Only the latter statement focuses on the end goal to be achieved and opens up the possibility of finding alternative means of achieving it. It suggests that one consider all options to find ways to promote the peaceful and productive handling of conflict. In the first statement, the need for permanent arbitrators, adversarial systems and rights-based claims are already assumed. Analysis starts from these points and tries to move forward. This effectively eliminates consideration of other possibilities.

As a result of the adversarial approach, the procedures that accompany it, and the interposition of the institutional decision maker, people may be too removed from their conflict to productively resolve it. Rather than approaching conflict and the differences that the other person presents as an opportunity to grow and expand one's horizons, the lenses of the adversarial system focus the people into narrow and limiting channels. The conflict must be: culled of detail and summarized for explanation by the client to their lawyer; reframed and narrowed by the lawyer to be turned into a legally arguable dispute; supported by recognized legal rights derived from societal standards the person may not share; argued with acceptable adversarial legal reasoning, which may differ from the way the individual rationalizes the world; and, determined by a judge, who is bound by procedure, precedent, time and/or various other factors both personal and systemic. Direct communication between the people is limited and the decision maker is left to come to a conclusion which may or may not promote peace and productivity between the parties. Without the parties' direct participation, instances where their interests are fully met may occur more by coincidence than design.

Eisenberg acknowledges that a system such as he describes may resolve particular disputes while failing to resolve the conflict underlying them.[6] The distinction which the adversarial system makes between the two concepts has a significant impact upon the peace and productivity of its decisions. If conflict is the underlying source of the problem, a system which aims to *resolve* the dispute while ignoring the conflict leaves something important unaddressed. This distinction between "dispute" and "conflict" is an important one and will be returned to in Chapter Two.

2. Exploring The Possibility of a More Peaceful and Productive Approach to Conflict Resolution

Thus, the question is not how to resolve disputes while eliminating conflict or being satisfied with controlling the negative consequences of conflict. In fact, any attempt to eliminate conflict would be futile. "As individuals with different needs and desires and interests come into contact, conflict is inevitable. The question directly bearing on whether we can transform our world from strife to peaceful coexistence is how to make conflict productive rather than destructive.[7] If the justice system is no longer fully capable of meeting the demands placed upon it, then it ought to continue to evolve. This change can only come about through deliberate societal, and individual, choice and opinion. The result, a peaceful and productive conflict resolution system, hinges upon conceptual frameworks, enabling philosophies and approaches to conflict resolution that may not be possible through a revised adversarial system.

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[6] In a footnote Eisenberg states: "The function of conclusively resolving disputes should be distinguished from the function of conclusively resolving conflict. A court's resolution of a dispute may not resolve an underlying conflict between the parties that precipitated the dispute." Eisenberg, *supra*, note 25 at 4.

A definition of the proposed "productive approach" to conflict resolution may be stated as: an approach to conflict which recognizes the inherently equal worth of all individuals and enables them to personally deal with the full dynamics of conflict in a manner that fosters peace and growth in their relationships and in their person. The conceptual aspects of the peaceful and productive approach involve an understanding of the difference between dispute

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[7] Riane Eisler, *The Chalice and the Blade* (New York: HarperCollins, 1987) at 191-92. These views are shared by Jean Baker Miller who writes extensively about them in her book, *Toward a New Psychology of Women* (Boston: Beacon Press, 1976). Miller's work will be considered more extensively in Chapter Two.

(which focuses on selected aspects in dissension) and conflict (which focuses upon the full dynamic of dissension).[8] The productive approach depends upon the development of a view which embraces conflict as an opportunity for growth.[9]

Within a productive approach to conflict, individuals are empowered to resolve their own dissension in a way that fosters the attainment of their needs and interests.[10] This requires a shift in the power dynamics at play. Instead of relying upon objective power, and external decision making, decisions are made through a relational power dynamic which incorporates subjective, objective and relational aspects relevant to the individuals in conflict.[11] In the discussions to follow, it may appear, at times, that there is an over-emphasis on subjective power, i.e. the power of an individual to do things for him or herself. However, the intention is that there be a balanced inclusion of subjective, relational and objective elements.[12] To the extent that the subjective element stands out, it does so because it is discussed at length below and it is so often ignored in literature discussing the adversarial system.

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[8] See Chapter Two, Part 2.

[9] See Chapter Two, Part 3.

[10] See Chapter Two, Part 3.2.

[11] See Chapter Two, Part 3.4.

[12] *Ibid.*

In the productive approach it is not assumed that one's needs and interests are pre-determined and then simply slotted into a justice system. Again, there is a three-part nature to an individual's needs and interests. If one's needs and interests are to be fulfilled peacefully and productively, then the mechanisms of the justice system should be peacefully and productively modelled wherever possible.[13] This is to be accomplished, in part, through an interest-based approach to conflict, rather than a position-based approach.[14]

The philosophy underlying a productive approach sees a similar threefold nature in the determinants of human conduct. Individual goals and autonomy are impacted upon by individual, social (objective) and relational factors.[15] The extent to which each determinant is to be applied is dependent upon the extent to which it is expected to be productive or harmful.[16] Participants in the conflict resolution system will invariably draw conclusions and bottom lines. However, their conclusions and bottom lines would be drawn with an attitude that does not preclude re-consideration or attempt to coerce the conduct of another before giving due consideration and respect to that other's wishes.[17] The course of action to be followed ought to be determined through a relational decision making process. Coercion, where it exists, will be used to enhance co-operation and avert adversarialism.[18]

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[13] See Chapter Three, Parts 7-10.

[14] See Chapter Two, Part 4.

[15] See Chapter Three, Parts 2-3.

[16] See Chapter Three, Parts 4-5.

Following upon these views, it becomes apparent that the desired changes cannot be achieved by simply modifying the adversarial justice system.[19] The partisanship nature of the adversarial system is structurally incompatible with views that hope to incorporate a threefold dynamic for conflict resolution.[20] This is made clear by an analogy drawn between the adversarial system and the philosophical puzzle of the prisoner's dilemma. The prisoner's dilemma is a paradox created by uncertainty in decision making. In many ways the dilemma resembles the uncertainties of decision making in the current adversarial justice model. However, unlike the prisoner's dilemma, the adversarial system's uncertainties are contingent and artificially imposed. While it may not possible to alter the prisoner's dilemma, and remain true to the puzzle, the justice system has no such constraints. It is possible, and desirable, to model the justice system on core elements which are co-operative, rather than adversarial, in nature.[21]

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[17] See Chapter Three, Part 6.

[18] See Chapter Five, Part 1.

[19] See Chapter Four.

[20] See Chapter Four, Part 1-2.

Focus can be placed upon enhancing the skills of individuals in conflict and enabling them to make, and carry out, the choices necessary to live a more productive lifestyle.[22] While there may be several initial objections to a shift toward more private decision making, they can be effectively responded to.[23] These responses will hinge upon two main concepts. First, it will be important to realize that a productive approach does not abandon objective (or systemic) laws and procedures. Thus, it is not a shift to privatization of decision making. Instead, it attempts to balance objective laws with the subjective and relational demands of those affected by them. It is also recognized that often there is no defining characteristics which make one's actions clearly subjective (i.e. without impact upon others), nor is there a clear character which makes a law or procedure wholly objective (i.e. without any flexibility for individual situations). The key is in seeking a balance which is built upon a productive and co-operative core and which strives to give weight to the subjective, relational and objective elements at play.

Secondly, many of the criticisms of the proposed productive approach are only applicable within an adversarial backdrop. That is, if the attempt is made to employ some productive mechanisms while retaining adversarial attitudes, the consequences for peace and productivity will be less than optimal. However, if the productive approach is adopted as the core philosophy for the justice system, then dissatisfaction should be limited to those who retain the desire to be adversarial and are thwarted in that desire. This is an unavoidable consequence if the goals of peace and productivity are to be achieved. Further, the disgruntlement of those who persist in adversarial behaviour is not a consequence that supporters of the productive approach would apologize for.

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[21] See Chapter Four, Part 3.

[22] See Chapter Five, Parts 1-2.

[23] See Chapter Five, Part 3.

In considering possible alternative paths for the evolution of the justice system herein, the inquiry will be confined to the civil side of the adversarial system. There are many differences between the civil and the criminal systems which would require discussion in order to extend the inquiry to criminal justice. Those differences will not be explored here.[24] This is not a concession that the

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[24] For an interesting and illuminating discussion of these differences see David Luban, *Lawyers and Justice* (Princeton: Princeton University Press, 1988). For example at page 60 he writes:

> "In fact ... criminal defense is a very special case, in which the zealous advocate serves atypical social goals. The point is one of political theory. The goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained ... our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order. To guard against there dangers, we protect our rights by in effect overprotecting

criminal justice system is exempt from the analysis to follow, but the points necessary to demonstrate that it is not exempt will not be focused upon.

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them."
And, at page 66 he goes on to say:

> "[T]he point of the distinction is that the adversary system means something different in the criminal defense paradigm than it does in the civil suit paradigm ... the 'final cause' of the adversary system is different in the two paradigms. In the latter, the primary end of adversary adjudication is legal justice, the assignment of rewards and remedies on the basis of the parties' behavior as prescribed by legal norms. The adversary method is supposed to yield both accurate accounts of past behavior and correct interpretations of the law. In the criminal defense paradigm, on the other hand, the primary end of the adversary system is not legal justice but the protection of accused individuals against the state or, more generally, the preservation of the proper relation between powerful institutions and those over whom they are able to exercise their power.
>
> It seems, then, that focusing on the adversary system in terms of the criminal defense paradigm obscures the issue of how it works as a system of justice; and for this reason the proper focus of inquiry should be the civil suit paradigm. That paradigm accounts for the true nature of the adversary system, and that is where a defense of the adversary system must stand or fall. For only in the civil suit paradigm are we attempting to vindicate adversary procedure as a system of justice."

CHAPTER TWO:

The Conceptual Framework for Peaceful and Productive Conflict Resolution

1. The Need to Clarify the Conceptual Framework

As indicated in Chapter One, the evolutionary changes necessary to bring about a more productive justice system will require deliberate choice. This chapter expands upon the meaning behind some of the terms which are central to this discussion.

As established in Chapter One, past evolutionary steps have directed the legal system toward forms which are more peaceful and productive than the preceding ones. The more peaceful elements are discernible in the move from violence and bloodshed to compensation. In this sense peaceful development eliminates warfare, feuds and physical violence. But, it has also been said that "the nature of war, consisteth not in actual fighting; but in the known disposition thereto".[1] As such, peaceful evolution must also address emotions, motives and other attitudes which would result in open hostilities but for the system which prevents them. The past focus has been more concerned with curbing the undesirable consequences of these pro-violent or aggressive tendencies rather than acknowledging and dealing with them directly. Further advancement of peaceful evolution in the legal system depends upon creating approaches that prevent hostility *and* deal with underlying belief systems or attitudes.

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[1] Thomas Hobbes, *Leviathan*, ed. by Michael Oakeshott (New York: Collier Books, 1962, 1651) at 100.

Identifying the necessary productive steps is difficult without a clear vision of what is meant by "productive conflict resolution." Productive conflict resolution can be explained by distinguishing "conflict" from "dispute"; and "productive" from "destructive" views of conflict. Consideration of the advantages that may be realized through an interest-based approach to conflict resolution, as distinguished from a position-based approach, is also important. These issues will be discussed, respectively, in parts 2-4 below.

2. Defining Dissension, Dispute, and Conflict

Dissension is the result of some change in people's relationship that makes them no longer compatible on one or more of their needs or interests. The term dissension is not used because it covers different ground than conflict; rather, it has been chosen so that specific meaning could be reserved for the terms "dispute" and "conflict". From this point forward, the term dissension will be used when it is necessary to refer generally to disagreements between individuals. This will be done in circumstances where the context does not require a distinction to be made between a dispute or conflict focused approach.

The distinction between "dispute" and "conflict" was first touched upon in Chapter One when discussing Eisenberg's observation that the adversarial system may resolve particular disputes while failing to resolve the conflict underlying them. This result occurs because the dispute process refines problems into their most concentrated form, determines the law(s) or rules which apply, isolates the "relevant" factors and then goes about applying the general "objective" criteria. Effort is directed at delineation of the thing(s) or particular occurrence(s) that went wrong and to determine who is responsible. These individual aspects are then "solved" in effective isolation from the relationship dynamics which spawned them.

While this may appear to be an eminently logical, fair and practical approach to take, one should not accept such an evaluation too quickly. A focus on dispute has the effect of externalizing the dissension by requiring people to define their problems in "objective" terms. As such, dispute takes its definition solely, or primarily, from the interests and values of the society and the legal system. Individuals are required to structure their dissension into conforming paths. A person's needs, interests and possible alternate solutions, are all given a back seat or ignored in the strict pursuit of only those past facts deemed relevant by strictly construed laws and precedents. If a person cannot state his or her needs in a concise factual way and fit them within a defined right, then her or his needs will go uncanvassed. This can only lead to further problems and further conflict. When one notes that it is, at times, difficult or impossible to set out emotions, desires, needs and interest in factual terminology, the possible insufficiency of a dispute focus becomes apparent.

For example, consider the function, goals and development of the rules of pleading in civil procedure. Through the rules of pleading:

> "litigation is narrowed down to two or three matters which are the _real_ questions in dispute. The pleadings should always be conducted so as to evolve some clearly defined _issues_, that is, some definite propositions of law or fact, asserted by one party and denied by the other ..."[2] [emphasis added]

This procedure has a long history in English courts. "The production of an issue [emphasis added] had been not only the constant effect, but the professed aim and object, of pleading."[3] In the past, this process was emphasized to the extent that claims and defenses had to be distilled to a single issue.[4] If a party had more than one claim or defense he or she had to elect between them.[5] Secondary claims resulted in separate actions each with their own single defense.[6]

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[2] D.B. Casson, and I.H. Dennis, *Odgers' Principles of Pleading and Practice In Civil Actions in the High Court of Justice*, 22 ed, (London: Stevens & Sons, 1981) at 87.

[3] *Ibid*. at 89.

[4] *Ibid*.

[5] *Ibid*.

This is not to say that the formal rules of pleading are lacking certain justification. A claim may be made that they ensure6Xefficientuse of public court resources by narrowing and simplifying the question that the court must answer. By requiring the parties to state their case in precise terms the judge is then able to render his or her decision on a clear issue.[7] As a result, the process is made easier for those employed within the legal system. However, it cannot be denied that many factors which the litigants consider to be important will be left out. One cannot help but suspect that such a process is not optimally efficient for them.

As the rules of pleading were developing so were the courts and the skills of the judges and lawyers that practiced in them. Over time the rules of pleadings have been amended so that it is now possible to combine claims, counterclaims, defenses, alternate defenses and even multiple parties in a single action. This is undoubtedly because it was realized over time that it is more efficient to deal with all issues between related parties and claims concurrently. However, the adversarial procedure still looks for a reduction of the dissension into specific issues.

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[6] *Ibid.*

[7] *Ibid.* at 88.

What is now being suggested is that another step in the evolution of the justice system be taken. That is, it may be more efficient to deal with all of the dynamics in a conflict at the same time. Such an approach seems preferable to deciding upon the issues and then leaving the parties no recourse but to return to court when the unresolved conflict flares up again.

If dissension is approached with a focus on "conflict," the scope of consideration is broadened to include the various interests and values the disputants bring with them. While a conflict-focused approach will still consider the thing(s) or particular occurrence(s) that went wrong it does not stop there. It goes on to ask why things went wrong and considers the underlying beliefs and attitudes that constitute the root causes of the conflict. This broadening of scope gives more opportunity for productive solutions which will not only resolve the immediate dispute but will also reduce dissension in the future relationship. Essentially, a conflict-based approach is an holistic one; whereas, a dispute-based approach is more reductionistic.[8]

It is true that with refined rules of pleadings each person comes to know the case he or she has to meet. Pleadings insure that the individual does not have to answer for everything in her or his past. It should be made clear that the conflict-focused approach is not suggesting that all aspects of an individual's life or history be the subject for review. However, if something is relevant to productive resolution of the conflict it should be dealt with even if for no better reason than to have it put behind the parties so that they may move on to a productive resolution of their conflict. Restricting the dissension resolution to claims which fit the values of the legal system may be insufficient.

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[8] For a discussion of holism and reductionism see Douglas R. Hofstadter, "Prelude ... Ant Fugue" *The Mind's I* ed. by Douglas R. Hofstadter and Daniel C. Dennett (Toronto: Bantam Books, 1981) at 149-201.

3. Examining the Destructive and Productive Views of Conflict

3.1. Conceptual Underpinnings

To a large extent, the concepts of productive and destructive dissension resolution can be derived from the work of Jean Baker Miller, *Toward a New Psychology of Women.*[9] One of Miller's main purposes in reviewing the nature of conflict is similar to the purpose in this thesis. In her words:

> "... the conduct of conflict does not have to be the way it has been. That is, the methods of conducting conflict do not have to be those we have always known.

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[9] Miller, *supra*, Chapter 1 note 7. In her book, Miller is writing with a primary focus on the conflicts women experience in their pursuit of self-definition and self-determination. She does not make any explicit distinctions between dispute and conflict; nor, does she make any concerted attempt to apply her ideas to dissension resolution where women may not be involved. However, her observations are ideal for a broader application.

There can be others."[10]

From this conviction she goes on to ask what she considers to be the important questions, "[W]hat really causes conflict, and have we accurately formulated the terms of the conflict?"[11] Her ensuing discussions of productive and destructive conflict provide building blocks for a different perspective against which one may test the effectiveness and efficiency of the way conflicts are resolved, both inside and outside the adversarial system.

Underlying Miller's look at conflict is a series of propositions and observations which are helpful in discerning the nature of destructive and productive dissension resolution. One such observation is that growth is essential to all life, and this necessarily implies change.[12] It is stating the obvious to say that one can not both grow and stay the same. In the realm of dissension resolution, it is reasonable to conclude that one can not resolve dissension while continuing to deal with it in the way it has always been dealt with. If people in conflict had been capable of accommodating each other's differences with traditional skills and actions, they would not be at an impasse in the first place. It follows that they have to find alternate ways of dealing with and incorporating each other's differences in their respective lives.[13] Therefore, what the parties could most benefit from is a process that provides a forum and the tools to grow within relationships in ways that both disputants find desirable.

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[10] *Ibid.* at 127.

[11] *Ibid.* at 126.

[12] In Miller's words: "The very essence of all life is growth, which means change." *Ibid.* at 54.

Flexible methods for resolving dissension will meet demands from people with divergent needs and interests. New forums and tools may be required as different individuals, in different relationships, turn to the justice system for help in their dissension resolution. Whether flexible forums and tools can be provided, while at the same time allowing the justice system to retain consistency, depends in part upon how people view conflict.

People's interests and needs are as often based upon personal values, emotions and traditional cultural beliefs as they are upon rationalizations or conformity to legal maxims. "Interests" may be loosely defined as what people value based upon personal choice influenced by the customs of their own particular culture. "Needs" are loosely defined as requirements that must be met to allow one to carry out or pursue one's interests. Therefore, needs are more essential or prior in the sense that they must be fulfilled if any further action is to take place. However, interests are what drive the needs and also have intrinsic worth for the individual. A dissension resolution system that does not enable each person involved to directly deal with his or her needs and interests will only be productive for those who share the same values as the framers of the system.[14]

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[13] Miller writes: "Conflict, seen in its fullest sense, is not necessarily threatening or destructive. Quite the contrary ... we all grow via conflict ... Growth requires engagement with difference and with people embodying that difference." *Ibid.* at 13.

3.2. The Productive Conflict View

The goal of productive dissension resolution is that each party should perceive more, want more and have more resources following each conflict. As Miller has written:

> "Both parties approach the interaction with different intents and goals, and each will be forced to change her/his intent and goals as a result of the interaction - that is, as a result of the conflict. Ideally, the new intent and goals will be larger and richer each time, rather than more restricted and cramped. That is, each party should perceive more, and want *more* as a result of each engagement and have more resources with which to act."[15]

However, the productive process is also sensitive to the fact that people do not construct their lives in isolation.[16] Individuals are empowered to look toward productive change for themselves in the context of their relationships in the world. Miller states:

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[14] Chapter Three will discuss the individual and relational aspect of needs and interests and discuss enabling philosophies which improve each individual's ability to productively define and realize his or her own needs and interests.

[15] Miller, *supra*, Chapter 1 note 7 at 129. Miller's terms "intents" and "goals" parallel the usage of the terms "needs" and "interests" in this paper. Interests were previously defined as comprising what people value based upon personal choice influenced by the customs of their own particular culture. In this fashion they represent goals for the individual who holds the interest. Needs were defined as requirements that must be met to allow one to carry out or pursue one's interests. Miller's use of the term "intents" points towards a person's intentions and plans for future activity; thus, they represent the means or requirements believed to be necessary to achieving the goals or interests they hold.

[16] The relational dynamic, which posits human beings as a composite of individual and social action, is dealt with at length in Chapter Three.

> "Personal creativity is a continuous process of bringing forth a changing vision of oneself, and of oneself in relation to the world. Out of this creation each person determines her/his next step and is motivated to take the next step. This vision must undergo repeated change and re-creation."[17]

And, in the words of Riane Eisler:

> "Approaching each other with different interests and goals, each party to the conflict is forced to reexamine its own goals and actions as well as those of the other party. The result for both sides is productive change rather than nonproductive rigidity."[18]

Admittedly, there are those who may object to such statements as being unrealistic.[19] In a case of limited or fixed resources, or mutually exclusive demands over the same asset or opportunity, how can each party leave with more than they came in with? What is being suggested is an altered mind set which focuses on the parties' underlying needs and interests in an attempt to discover alternate ways to satisfy them. Instead of asking who gets the whole pie, the parties contemplate the possibility of sharing the pie; the prospects of enlarging the pie via their joint efforts; or, perhaps better still, developing something new that will meet both of their needs better than the original pie ever could. There are many cases where competing individuals could accomplish more together than they cumulatively could by acting alone.[20]

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[17] Miller, *supra*, Chapter 1 note 7 at 111.

[18] Eisler, *supra*, Chapter 1 note 7 at 192.

[19] For further discussion of this objection see Chapter Five, Part 3.1, The Distributional Bargaining Problem.

Dealing with differences in underlying needs and interests directly takes advantage of the likelihood that the individuals involved are generally best positioned to know what they desire from their relationships. As well, it recognizes that the individual is the one who best knows what she or he is willing and able to contribute to the relationship. It has been stated that:

> "If differences were more openly acknowledged, we could allow for, and even encourage, an increasingly strong expression by each party of his or her experience. This would lead to greater clarity for self, greater ability to fulfil one's own needs, and more facility to respond to others. There would be a chance at individual and mutual satisfaction, growth, and even joy."[21]

Such an approach also provides the individuals with a learning opportunity. When one sees the way another person attempts to fulfil her or his needs one may learn useful techniques. The other person's approach may be a novel one, and an instructive one, but there will be no opportunity to discover it if the dissension resolution process fails to allow for and respond to needs and interests directly.[22]

What advocates of the productive approach are looking for are "win-win" solutions for resolving dissension. In

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[20] For a philosophical discussion of the benefits of co-operation, holism, reductionism and how the whole may obtain aspects or characteristics not possessed by any of its individual components see Hofstadter, *supra*, note 8 at 149-201.

[21] Miller, *supra*, Chapter 1 note 7 at 13.

[22] This point is also made by Miller who writes: "Each could have 'learned' much from the partner's way of handling these basic issues, but this does not usually happen when a relationship fails to allow for and respond to important needs." *Ibid.* at 18.

Riane Eisler's words:

> "It is a 'win-win' rather than a 'win-lose' view of power, in psychological terms, a means of advancing one's own development *without* at the same time having to limit the development of others."[23]

3.3. The Destructive Conflict View

Unlike productive dissension resolution where the effort is made to enlarge the goals and resources of the people involved, in destructive dissension resolution processes, "All too often, the opposite is true, and conflicts result in *lowered* goals and diminution of resources."[24] The decisions in destructive conflict resolution processes are often past looking, focused on what someone has done wrong, and aimed at telling one of the parties what they are not within their rights to do. At the outset, the parties employing a destructive process know that both of them will not 'win'. One of them will be forced to leave behind some of her or his deeply felt motives and needs.[25] In Miller's words:

> "Conflict [within the current predominant view] is made to look as if it *always* appears in the image of extremity, whereas, in fact, it is actually the lack of recognition of the need for conflict and provision of appropriate forms for it that lead to danger. This

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[23] Eisler, *supra*, Chapter 1 note 7 at 193.

[24] Miller, *supra*, Chapter 1 note 7 at 129.

[25] For this explanation of destructive dissension resolution I am indebted to Miller who wrote: "Destructive conflict calls forth the conviction that one cannot possibly 'win' or, more accurately, that nothing can really change or enlarge. It often involves a feeling that one must move away from one's deeply felt motives, that one is losing the connection with one's most importantly held desires and needs." *Ibid*. at 129.

> ultimate destructive form is frightening, but it is also *not* conflict. It is almost the reverse; it is the end result of the attempt to avoid and suppress conflict."[26]

As such, the destructive dissension resolution approach favours those whose attitudes and beliefs are consistent with confrontation and gaining personal advantage in situations which, at the same time, limit the development of others. This may be a satisfactory approach for those who are on the winning end of the argument; however, it can be consistently expected to provide satisfaction to only one-half of those who enter the process. It will be fully satisfactory (in the eyes of the victorious party) if the victorious party gets everything he or she wants; and, wholly unsatisfactory (in the eyes of the losing party) if the losing party gets nothing he or she claimed. Generally, this is the highest cumulative level of satisfaction that will be achieved. In a predominant number of instances it will be a forum of mutual exclusivity where one party's satisfaction only increases to the extent that the other party's satisfaction suffers a corresponding decrease.

The reason for the lower levels of satisfaction, at least in part, is that destructive dissension resolution diverts people from conflict on their real differences in interests and the needs that they require for personal growth. The focus of the destructive process is dispute, narrowly defined, which may make logical sense in the abstract, but fails to meet the full demands of the not always logical human condition. This deviation from discussion of the underlying needs and interests is also commented upon by Miller. She writes:

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[26] *Ibid.* at 130.

> "In sum, both sides are diverted from open conflict around real differences, by which they could grow, and are channelled into hidden conflict around falsifications. For this hidden conflict, there are no acceptable social forms or guides because this conflict supposedly doesn't exist."[27]

3.4 Power Dynamics in Productive and Destructive Conflict Resolution

Connected with the two views of conflict are different views on the nature of power that is appropriately used. The nature of power in decision making may be considered from at least three perspectives. The first view is commonly referred to as "power for" oneself, or subjective power. It is the power which each person possesses which enables them to make decisions and take actions to guide the course of her or his life.

The second view of power is "power over", or objective power. It is the power which individuals and groups possess that enables them to control the actions and circumstances of others. The powerful may use it to guide their own lives, the weak are governed by others who wield it.[28]

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[27] *Ibid*. at 13.

The third view of power can be termed "power with", or relational power. It is the power of combination, individuals working in relationships to set out the boundaries of appropriate action. It can either enable or limit individual action; it can either liberate or suppress weaker individuals. Whether it enables, limits, liberates or suppresses, depends upon the level of participation each individual is able to make; and, whether the necessary resources are made available to ensure that those who wish to participate may do so effectively. In a relational view of power it is recognized that in any relationship where the participants are considered equal in theory they must each contribute to a common endeavour to ensure that they are equal in practice. If one individual exercises more objective power than another, and uses it to control the outcome for the relationship, then the relationship is not an equal one.

The type of power used will have an impact on the resolution of dissension. The narrower the power base the narrower the range of solutions available. The more that objective power is consolidated in one person's hands, the more the solutions will be dictated and of particular interest to the objective power wielder.

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[28] In discussing these first two aspects of power Miller writes: "In general, for women today, power may be defined as 'the capacity to implement.' ... This has not been the meaning of 'power' in the past. Power has generally meant the ability to advance oneself and, simultaneously, to control, limit, and if possible, destroy the power of others. That is, power, so far, has had at least two components: power _for_ oneself and power _over_ others. (There is an important distinction between the ability to influence others and the power to control and restrict them.) The history of power struggles as we have known them has been on these grounds. The power of another person, or group of people, was generally seen as dangerous. You had to control them or they would control you. But in the realm of human development, this is not a valid formulation. Quite the reverse. In a basic sense, the greater the development of each individual the more able, more effective, and less needy of limiting or restricting others she or he will be." *Ibid.* at 116.

Given these distinctions, the productive view of dissension places its focus on relational power and, in a connected way, on subjective power. This focus recognizes that people's actions are limited by the scope of the relationships they are in, i.e. not all actions are possible or desirable within all relationships. However, it expands subjective power by allowing the nature of the relationship itself to be part of the dissension resolution process. The range of goals that can be pursued and the acceptable means to pursue those goals are both open for discussion. By being a part of the process which defines the boundaries of the relationship, rather than having the boundaries imposed solely by external agents, the individual increases his or her subjective power.

The current system of adversarial justice emphasizes the use of objective power. To the extent that subjective power is attainable its boundaries are set by external agents. If a person finds him or herself in conflict, the issues that can be addressed are fixed by legislation, precedent and traditional rights interpretations. Dissension is handled by the declarations of external agents who direct what can and cannot be done by the individual.

The productive approach requires individuals to be responsible for their role in relationships but attempts to set the boundaries of subjective power through an emphasis on power with. Objective power is a factor in the productive approach, i.e. legislation and rights are relevant; however, it is not always the primary factor.

4. Distinguishing the Position-Based Approach From the Interest-Based Approach.

Concurrent with the evolution of the adversarial system, and the destructive view of conflict, a position-based approach to dispute resolution has developed. The position-based approach requires each person to develop a firm statement of the view he or she has on the "objective" facts. The person then proposes a solution for dealing with the "objective" facts that is most suitable to him or her. The two "objective" statements are then pitted against each other and the one that is found to be closest to the decision maker's assessment of the objective truth is selected.[29] Although the effect of the decision on the person whose position was not selected may be unfortunate, it is not directly considered; to the victor go the spoils.

In *Effective Mediation*,[30] positional based negotiation between individuals is defined as:

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[29] Similar to the threefold view of power, the productive approach posits a threefold view of truth and facts. The details of this threefold view of truth and fact and how they are arrived at are discussed in Chapter Three.

[30] Christopher W. Moore, *Effective Mediation* (Boulder: CDR Associates, 1989.)

> "a negotiation strategy in which a series of positions - alternative solutions that meet particular interests or needs - are selected by a negotiator, ordered sequentially according to preferred outcomes and presented to another party in an effort to reach agreement. The first or opening position represents that maximum gain hoped for or expected in the negotiations. Each subsequent position demands less of an opponent and results in fewer benefits for the person advocating it. Agreement is reached when the negotiators' positions converge and they reach an acceptable settlement range."[31]

Positional based bargaining is based upon the belief that: i) resources are limited; ii) the other negotiator is an opponent and one must be hard on him or her; iii) a win for one means a loss for the other; iv) the goal is to win as much as one can; v) concessions are a sign of weakness; vi) there is a right solution, one's own; and, vii) one must be on the offensive at all times.[32]

From this summary, one may see that the original positions stem from each person's perceived needs and interests devised separately and outside a relationship context. As the people move away from their opening positions they move away from their needs and interests. Each successive position is a poorer representation of what the individual really wants. By turning away from a discussion which focuses on needs and interests, and bargaining on positions, the positions become overvalued and the needs and interests overshadowed.

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[31] *Ibid.* at 12.

[32] *Ibid.*

Contrasted with the position-based approach is the interest-based approach. The interest based approach requires each person to analyse the beliefs, needs, personal values and similar dispositions that they bring with them to the dissension. These needs and interests are then disclosed in the dissension resolution process. Recognition is given to the objective, subjective and relational situation the people are in.[33] The effort is made to reach a conclusion that best suits the demands of this threefold consideration. To the extent that external parties become involved they also use their abilities (and decision making power) in ways that are in keeping with the threefold consideration.

In the case of ongoing negotiation between individuals, interest-based bargaining may be described as:

> "a negotiation strategy that focuses on satisfying as many interests or needs as possible for all negotiators. It is a problem-solving process used to reach an integrative solution rather than distributing rewards in a win/lose manner. It is not a process of compromise."[34]

For interest-based bargainers: i) resources are not assumed to be limited; ii) the interests of all negotiators must be addressed for an agreement to be reached; iii) focus is on interests not positions; iv) looking for objective or fair standards on which to agree to is important; v) they proceed with the belief that there are probably multiple satisfactory solutions; vi) people should work as co-operative problem solvers rather than opponents; vii) people must be respected; and, viii) win/win solutions should be sought.[35] In defining needs and interests the process recognizes that there are substantive, procedural and relationship needs and interests to be addressed.[36]

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[33] How the subjective, objective and relational elements of the dissension can be effectively combined and dealt with is discussed in Chapter Three.

[34] Moore, *supra*, note 30 at 17.

In interest-based bargaining, people do not start with opening positions. Instead they begin by explaining their needs and interests from as many angles as necessary to facilitate mutual understanding. Once the needs and interests are known they remain the focus. Attempts are made to achieve solutions to address the real reasons that led to dissension between the parties.

Consider the example of a separating couple with children. They are in agreement that the children will spend the largest part of the time with their mother, yet the father demands sole custody. The mother believes it is in the children's best interests to see their father and for their father to have input into the major decisions in the children's lives, yet she responds with a claim for sole custody. They both believe joint custody is not an option as the father is away on business for lengthy periods and contact between the parents usually leads to an argument.

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[35] *Ibid.*

[36] *Ibid.*

To an outsider the deadlock may make little sense. One person looking at the case may wonder why the mother should not have sole custody since both parents agree the children will be with her most of the time anyway. Another onlooker may wonder why the father should not have sole custody, or why joint custody should not be imposed, since the mother acknowledges the value of the father's input into decisions for the children. With a position-based approach either the mother or the father will gain sole custody (unless the court feels the position of the children demands an order for joint custody despite the stated positions of the parents).

With an interest-based focus those facilitating the resolution of the conflict may discover that the woman wants sole custody so she doesn't have to answer to her ex-husband for every child-related decision she makes. The father wants sole custody so he will be involved in major medical, legal or educational decisions pertaining to the children. By canvassing other options the parents may be able to agree to sole custody (including all day-to-day decision making) being granted to the mother with certain fixed guardianship rights (defined in relation to particular major decisions) reserved for joint decision. There is room to agree because the father doesn't care about the day-to-day decisions and the mother doesn't object to consultation with the father on major decisions.

However, it may be asked, "How does this example constitute a systemic problem and not simply a lawyer/client communication problem?" "Wouldn't the problem have been avoided if the lawyers explained the full options at the outset?" At times it may be the case that the problem lies with the lawyers' failure to properly explain the options; but it is often more than that. When the clients go to see their lawyers they may already expect to be entering an adversarial forum which creates winners and losers. They are not looking for compromise and the adversarial process may give them little opportunity or incentive to do so. If they show weakness or attempt to compromise they risk being taken advantage of.

Additionally, once people go into their lawyers' offices the responsibility for the conduct of the case passes into the lawyers' hands. In some cases the people may be happy to leave matters to their lawyers to take care of. The lawyers may even explain custody and guardianship fully but if the client doesn't understand there is little in the formal court structure that seeks to identify such confusion. When the matter goes to court the judge will leave the conduct of the case to the lawyers. The judge's role is not to question the disputants on their underlying needs or the reasons they have made the claims they have. Once the people's positions are developed they can quickly become entrenched and any confusion the clients had will become even more difficult to discover.

The apparently contradictory client actions in the example provided arise because the individuals focus on the wrong things or have a limited understanding of the options available. They choose a position because they think it is the only one, or the best one, available for achieving their needs and interests. However, if a better solution could be found they should have little objection to it so long as they have not come to identify with their position to the extent that abandoning it constitutes a loss of face.

5. Productive Conflict Resolution as *an* Approach not *the* Answer

It is important to realize that productive dissension resolution does not provide *the* answer. Rather, it constitutes a preferable approach to enable those in conflict to look for answers which best suit their circumstances. The above discussion defines some of the concepts involved in productive conflict resolution. To be better able to discuss the manner in which individuals may proceed to resolve conflict productively it is useful to give further consideration to the theoretical underpinnings for the productive conflict resolution approach. For this purpose one may turn to the enabling philosophies of John Stuart Mill and Jennifer Nedelsky.

Chapter Three:

An Enabling Philosophy for Individuals and Society in Conflict

1. An Enablement Philosophy

The assumption carried into this chapter is that all individuals - regardless of race, class, gender, culture or other difference - have different, but not less valuable, potential for growth and productive fulfilment. In order to develop their potential, these different individuals will have different needs in differing degrees. Accordingly, the value of a justice system may be assessed based upon how well it meets the diversity of needs and interests of all the people who live under its jurisdiction, i.e. upon how well the system achieves the goals of peace and productivity.

To more fully understand the role productive conflict resolution can play in assisting people to meet their needs and interests it is necessary for individuals and society to change the way they view the very nature of conflict. It is also important to integrate into that view a philosophy of the nature and scope of the individual and societal role in conflict resolution. Based upon selected insights of John Stuart Mill[1] and Jennifer Nedelsky,[2] one may paint a clearer picture of the core philosophy which a dissension resolution system ought to embrace if disputes are to be resolved peacefully and productively.

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[1] John Stuart Mill, *On Liberty* (Indianapolis: Hackett Publishing Company, 1978).

Mill and Nedelsky write from within the context of a liberal democratic setting. They suggest the possibility of evolutionary advancement rather than a need for revolutionary restructuring. Thus, their philosophy will be more practical than that of authors who rely upon an entirely different foundation. Mill and Nedelsky also provide two versions of an enabling philosophy which, when combined, provide essential elements for the evolution of a productive conflict resolution system. Mill's work provides one possible justification for the current liberal approach to dissension resolution. As such, it provides a basis from which evolution may proceed. Nedelsky's work exemplifies some of the current demands being placed upon the justice system. As a result, she provides valuable direction for the development of a productive response to dissension.

As well, Mill and Nedelsky in many ways pursue the same theoretical end. Each of them seeks an environment that will enable individuals to develop self-chosen goals and direct their lives toward productive ends. The environments they envision, nonetheless, have a different focus and different structures. Each of them sees barriers and limits

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[2] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 *Yale Journal of Law & Feminism* 7 (hereafter "Autonomy"); and, Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1 (hereafter "Rights").

to self-direction but they differ in the way they perceive the limitations and in the recommendations they make to address them. Finally, both suggest that if societal consensus is to develop a system that will provide justice for all, then society and the justice system must evolve to meet the varying demands of the different people that come before it. Dissension resolution must encompass people's differences, and be rooted in a flexible framework if there is to be growth.[3]

2. Individual, Social and Relational Impact Upon Individual Goals

One barrier to the desired evolution is that the nature of custom is such that it is generally considered unnecessary to give reasons for customary ways of doing things.[4] As discussed in Chapter One, there is advantage to be gained by locating the authority for laws within custom rather than in an order imposed by God or the legislator. However, as also discussed in Chapter One, strict adherence to custom alone is not sufficent to enable the type of changes demanded in the modern plural society. The problem, according to Mill, can be located in the fact that custom unfortunately incorporates not only the wisdom of the past but also its prejudices and failings. As Mill stated:

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[3] As Mill writes: "... a person may, without blame, either like or dislike rowing, or smoking, or music, or athletic exercises, or chess, or cards, or study, because both those who like each of these things and those who dislike them are too numerous to be put down. But the man, and still more the woman, who can be accused either of doing 'what nobody does,' or of not doing 'what everybody does,' is the subject of as much depreciatory remark as if he or she had committed some grave moral delinquency ... [And, from Mill's footnote] All the minute details of his daily life are pried into, and whatever is found which, seen through the medium of the perceiving and describing faculties of the lowest of the low, bears an appearance unlike absolute commonplace, is laid before the jury as evidence of insanity, and often with success; the jurors being little, if at all, less vulgar and ignorant than the witnesses, while the judges, with that extraordinary want of knowledge of human nature and life which continually astonishes us in English lawyers, often help to mislead them." Mill, *supra*, note 1 at 65-66.

[4] Mill writes: "The effect of custom, in preventing any misgiving respecting the rules of conduct which mankind impose on one another, is all the more complete because the subject is one on which it is not generally considered necessary that reasons should be given, either by one person to others or by each to himself." *Ibid.* at 5.

> "an opinion on a point of conduct, not supported by reasons, can only count as one person's preference; and if the reasons, when given, are a mere appeal to a similar preference felt by other people, it is still only many people's liking instead of one. ... Men's opinions, accordingly, on what is laudable or blameable are affected by ... [s]ometimes their reason, at other times their prejudices or superstitions; often their social affections, not seldom their anti-social ones ..."[5]

What may be distilled from this observation is the idea that custom must be considered in a critical light if evolution is to proceed. This is especially so if the goal of evolution is to enable growth for all individuals and not just the majority who share the common customary view. As customary views come under question conflict is inevitable. However, it is also the case that customary means of resolving dissension do not have to remain as they have been.

A customary liberal view, applied in the resolution of dispute, is that individuals are the bearers of rights.

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[5] *Ibid.* at 5-6.

These individual rights may be used to protect and enforce the individual's chosen life path goals against all who would oppose them. In Nedelsky's view, the liberal belief that takes "atomistic individuals as the basic units of political and legal theory ... fails to recognize the inherently social nature of human beings."[6]

Nedelsky makes it clear that, when she speaks of the social nature of human beings, she does not merely mean that people will encounter one another in society.[7] Instead, what she considers is how these encounters will shape, and even create, the character of the people in the relationship. She writes:

> "Most conventional liberal rights theories, by contrast, do not make relationship central to their understanding of the human subject. Mediating conflict is the focus, not mutual self-creation and sustenance. The selves to be protected by rights are seen as essentially separate and not creatures whose interests, needs and capacities routinely intertwine ... Human beings are *both* essentially individual and essentially social creatures. The liberal tradition has been not so much wrong as seriously and dangerously one-sided in its emphasis."[8]

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[6] Nedelsky, Autonomy, *supra*, note 2 at 8.

[7] Nedelsky makes this clear in footnote 4 on p. 9 of her article. She writes: "I once heard a(n otherwise) thoughtful liberal theorist dismiss with exasperation the critique that liberal theory fails to take seriously the social nature of human beings. 'Of course it does,' he said. 'Liberal theory is all about the proper rules governing the interactions among people, so, of course it recognizes their social nature.' This observation completely misses the point. Drawing boundaries around the sphere of individual rights to protect those individuals from the intrusions of others (individuals or the state) naturally takes for granted the existence and interaction of others. Such an assumption, however, has nothing in common with the claim that a person's identity is in large part constituted by her interactions with others. On this view there is, in an important sense, no 'person' to protect within a sphere protected from all others, for there is no pre-existing, unitary self in isolation from relationships." *Ibid.* at 9.

[8] Nedelsky, Rights, *supra*, note 2 at 12-13.

Following this tack she asserts that society should find a way to both mediate and sustain the tension between the individual and the collective. The tension must be sustained because neither the values of the individual nor the values of the collective should be collapsed into one another.[9] However, if these tensions are to be maintained, there must also be a way of working through the conflicts that result. As was discussed in Chapter Two, conflict (tension) doesn't have to be avoided. It can be expressed as an opportunity for growth and change. It is an avenue, properly explored, that may lead to empowerment and new goals for those involved. Thus, what Nedelsky recommends is a partnership and co-operative approach to dissension resolution, i.e. the productive approach.

One may interpret Mill's philosophy in a similar fashion on this point. Mill wrote:

> "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it ... Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."[10]

Although this may, *prima facie*, appear to point toward strict individualism, a further consideration of the statement shows that a relationship focus is necessarily implicated. It is clear that Mill's counsel is meant to apply to all individuals, in a societal setting, and not to just one individual taken out of context. If all individuals are to pursue their own growth and not impede others efforts to do the same, then what happens in the face of dissension? From Mill's perspective, each individual must make the effort to resolve the conflict in a manner which will enable and empower the other's pursuit of her or his individual goals. Thereby, each must be conscious of how his or her individual actions can shape, and even create, the characters of those he or she has a relationship with.

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[9] Nedelsky, Autonomy, *supra*, note 2 at 35.

[10] Mill, *supra*, note 1 at 12.

Thus, in keeping with the above discussion, attainment of individual goals must be interpreted in light of the impact of individual and societal choice and the relationship between the two. Also, for these reasons the evolution of concepts of autonomy must also originate from within a relationship framework.

3. Relational Autonomy in the Productive Approach

A pertinent common sense observation was made by Mill when he wrote: "No one's idea of excellence in conduct is that people should do absolutely nothing but copy one another."[11] However, in the formation of laws, and the resolution of dissension, copying is primarily what is aimed at. The laws are drafted based upon the norm. Fact situations in adversarial litigation are plugged into similar precedents which are considered to be binding. In settlement discussions people are generally only prepared to settle along a narrow path that does not stray too far from their own world view.

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[11] *Ibid.* at 55.

What is often forgotten is the obvious fact that if strict copying is undesirable then differences between people are important factors in the process and must be fostered. Thus, there must be a way to accommodate difference. Unfortunately, the personal changes necessary to accommodate difference are often seen as threatening by an individual confronted directly with the need to change. Instead of this resistance to change and difference, relationships and individual behaviours considered to be outside the norm ought to be fostered. In Mill's view:

> "It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights *and interests* of others, that human beings become a noble and beautiful object of contemplation..." (emphasis added)[12]

This passage is an indication that Mill was supportive of a an approach to dissension resolution which would enable dissension to be resolved productively. Such an interpretation of Mill's work is further confirmed by his own words:

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[12] *Ibid.* at 60. The words "and interests" are emphasized to show that Mill had something more than the clashing of rights in mind when he wrote about stimulating difference. In Part 9, Justice in the Productive Approach, "rights" will be discussed and interpreted in a way that both incorporates Mill's traditional liberal views and which also facilitates growth among different individuals through relationship.

> "There is no reason that all human existence should be constructed on some one or some small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."[13]

By taking direction from Mill, one could move the productive approach forward in its evolution by returning people to their own decision making, wherever possible, so as to promote change and growth for individuals in their own ways of life. A problem with the adversarial system of justice is that final determination of dissension depends primarily upon the tenets of collective legislation being imposed by judges who are not part of the dissension. So long as the last word rests with judges, especially when set in their current role, the individual will remain essentially external to the resolution of her or his problems. The only voice the person will have is a general one which can be exercised when voting for members of government. If his or her needs are not shared by a majority, then the voice may forever be an ineffective one.

Hence, the legal tradition's suggestion of protection and control as the answer to productive development of autonomy is misguided.[14] In Nedelsky's words:

> "The common law has been informed and shaped by particular conceptions of fairness, freedom, and

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[13] *Ibid.* at 64.

[14] Nedelsky, Autonomy, *supra*, note 2 at 15.

> progress. The 'neutral' rules of the game correspond to a particular vision of the good society which gives advantages to some players over others in systematic, if not perfectly predictable ways."[15]

Rephrased, the concern is this, how will an institutionalized dialogue accurately speak for diverse individual needs and interests?

Instead, what should be developed is a process that allows those within relationships to structure their own participation according to their particular needs as they define, providing they remain conscious of the implications which their decisions have on others in the relationship. People can not be returned to their own decision making by employing a structure that purports to be accommodating and conscious of relationship but still makes decisions externally. This is not to say that the greater social context is irrelevant. As discussed above, it forms part of the relationship setting for the individuals, in some ways it is constitutive of that relationship. However, the social setting alone can not resolve the relationship dissensions without overlooking critical individual and relational components.

In *Autonomy* Nedelsky's primary focus is a new conception of autonomy that differs from the individualism characteristic of traditional liberal theory.[16] Nedelsky defines autonomy as being:

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[15] *Ibid.* at 19.

[16] *Ibid.* at 7.

> "governed by one's own law ... To become autonomous is to come to be able to find and live in accordance with one's own law."[17]

Also, in Nedelsky's words:

> "Autonomy means literally self-governance and thus requires the capacity to participate in collective as well as individual governance."[18]

In further explaining her view she writes:

> "... the law is one's own in the deepest sense, but not made by the individual; the individual develops it, but in connection with others; it is not chosen, but recognized. 'One's own law' connotes values, limits, order, even commands just as the more conventional use of the term does. But these values and demands come from within each person rather that being imposed from without. The idea that there are commands that one recognizes as one's own, requirements that constrain one's life, but come from the meaning or purpose of that life, captures the basic connection between law and freedom - which is perhaps the essence of the concept of autonomy."[19]

In recognizing that finding and living by one's own law is important, the above approach to autonomy shifts control back to the individual. This is accepting of difference and reflective of the spirit of Mill's exhortation that one's own mode of laying out one's existence is best. But, Nedelsky's desire to shift control to the individual does not constitute a complete shift. She writes of participation and connection with others. She is concerned with values, limits, order and even commands, or rights as the current justice system envisions them. By incorporating all of the dimensions, Nedelsky's view of autonomy is consonant with the view that individual goals are shaped by the individual, the collective and the relationships between them.

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[17] *Ibid.* at 10.

[18] Nedelsky, Rights, *supra*, note 2 at 8.

[19] Nedelsky, Autonomy, *supra*, note 2 at 10-11.

In her task of reconceptualizing autonomy Nedelsky claims a twofold objective. She writes:

> "There is thus a twofold objective in reconceiving autonomy: (1) to recognize that the irreducible tension between the individual and the collective makes choices or trade-offs necessary; and (2) at the same time, to move beyond a conception of human beings which sees them exclusively as separate individuals and focuses on the threat of the community. The collective is not simply a potential threat to individuals, but is constitutive of them, and thus is a source of their autonomy as well as a danger to it."[20]

The task then, in Nedelsky's words:

> "is to think of autonomy in terms of the forms of human interactions in which it will develop and flourish. And the starting point of this inquiry must be an attention both to the individuality of human beings and to their essentially social nature."[21]

Given Mill's and Nedelsky's approach to autonomy, particular behaviours, needs or interests which are seen to be desirable by an individual, become truly open for discussion. The presence of a restrictive law, precedent or custom can be examined in a critical light to determine if it stimulates growth or stunts it. If this is not done, the needs of the individual in the minority are left unsatisfied, and, along with conformity, resentment is likely to build. As stated by Mill:

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[20] *Ibid.* at 21.

[21] *Ibid.* at 21-22.

> "To be held to rigid rules of justice for the sake of others develops the feelings and capacities which have the good of others for their object. But to be restrained in things not affecting their good, by their mere displeasure, develops nothing valuable except such force of character as may unfold itself in resisting the restraint."[22]

Approaching autonomy in the evolved manner that Mill and Nedelsky suggest links back to the discussion of power dynamics in the productive approach.[23] What the modified approach to autonomy requires is a reduction of objective power and an enhancement of subjective power through a relational and co-operative approach to dissension. Thus, with the view of autonomy in the productive approach, individuals are seen as interconnected with each other, society, culture and the traditions in which they live. Self-definition and personal potential depend upon those interconnections. The limits to which one may pursue this self-directed/relational approach can be dealt with by a re-interpretation of Mill's harm principle.

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[22] Mill, *supra*, note 1 at 60-61. And, on this point, Nedelsky writes: "... powerlessness is destructive of autonomy ... The capacity [autonomy] can be destroyed by being subjected to the arbitrary and damaging power of others ... To be autonomous a person must feel a sense of her own power (which does not mean power over others), and that feeling is only possible within a structure of relationships conducive to autonomy ... Autonomy is a capacity that exists only in the context of social relations that support it and only in conjunction with the internal sense of being autonomous." Nedelsky, Autonomy, *supra*, note 2 at 24-25.

[23] Chapter Two, Part 3.4.

4. The Harm Principle

One way that traditional liberal theory deals with self direction, and limits to it, is by application of the harm principle. Mill sets out the harm principle as:

> "one very simple principle ... entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control ... is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right ... Over himself, over his own body and mind, the individual is sovereign."[24]

Although this passage has initial appeal, it is not without its ambiguities. One of the major questions to be answered is, what constitutes harm? Is any actual or perceived slight sufficient?

What seems to be consistent with Mill's overall intentions, and is consistent with the productive conflict resolution approach, is to understand the harm principle as referring to actions which limit a person's ability to pursue a peaceful and productive path. Advocates of a productive approach embrace the idea that harm is done when dissension is approached destructively.

Rather than considering harm as related to growth and enablement, traditional liberal discussion has attempted to sort out the public/private distinction that Mill mentions. When the matter is private, the state cannot interfere; when the matter is public, the state can (or perhaps must) intervene. But, focusing on the public/private distinction in the context of dissension resolution may be misleading for those who seek the goals of peace and productivity.

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[24] Mill, *supra*, note 1 at 9.

5. The Misleading Nature of a Focus on the Public/Private Distinction

In Chapter IV of *On Liberty* Mill proceeds to address the limits of society's authority over individuals.[25] He begins Chapter IV by asking:

> "What, then, is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin? ... To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society."[26]

Mill's work has been interpreted as drawing distinctions between the public and private activities of an individual and the state; and, the difference between society censorship of individual action via methods of societal opinion or enforced coercion.

The problem with the application of a public/private distinction is that everything depends upon how one proceeds to distinguish the realm of individual interests and the realm of societal interests. Mill suggests that everyone who lives within a society and derives benefit from it is obligated to make return for those benefits. This requires one to observe certain codes of conduct towards others which consist:

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[25] *Ibid*. at 73-91.

[26] *Ibid*. at 73.

> "... first, in not injuring the interests of one another, or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights"[27]

The problem with the passage is that in many ways it is circular and thus unhelpful. Mill is trying to determine which interests are not to be interfered with and then says that society is not to interfere with interests that can be seen as rights by legal provision or tacit understanding. However, both legal provision and tacit understanding are derived from collective opinion. Thus, Mill's explanation begs the question, for, according to Mill, it is often collective opinion that interferes with individuality and struggles with individual interests; and, it is that same collective opinion that must be resorted to when determining the scope of individual interest.

As has been asserted in more recent works, privacy is not a natural category; rather, it is a political one.[28]

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[27] *Ibid.*

[28] Frances Olsen, "Constitutional Law: Feminist Critiques of the Public/Private Distinction" (1993) 10 *Constitutional Commentary* 319 at 319; and, Hugh Collins, "The Decline of Privacy in Private Law" (1987) 14 *Journal of Law and Society* 91 at 91.

When a person is able to categorize his or her actions as private, it is expected that such a classification will place the conduct beyond question or attack.[29] In an effort to explain the privacy category, Collins refers to the "estrangement" and the "intimacy" conceptions. The "estrangement" conception insists that no obligation is owed to strangers.[30] The "intimacy" conception insists that legal rights are inappropriate for domestic and close social relations.[31]

In analysing these two conceptions, Collins states:

> "the estrangement conception of privacy insists that strangers and remote actors cannot have legal obligations thrust upon them, for that would violate their private autonomy. Yet ... friends and intimates cannot have legal obligations imposed upon them, for that would subvert the bonds of trust and affection which sustain their private relationship. The estrangement conception of privacy restricts legal obligations to intimates, whereas the intimacy conception only permits obligations between strangers."[32]

Collins then goes on to point out the apparent contradiction in these concepts; which, when either is given full reign, tends to subvert the other. However, he believes that too much emphasis should not be placed upon the contradiction analysis. Instead, he believes that the stranger/intimate categories should be seen as having interrelated meanings, each depending upon its contrast with the other for its definition.[33]

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[29] Olsen, *supra*, note 28 at 319; Collins, *supra*, note 28 at 91.

[30] Collins, *supra*, note 28 at 92. Collins writes: "The first conception of privacy insists that an individual owes no legal obligations to a stranger. This 'estrangement' conception of privacy confines obligations to those persons who have deliberately chosen to bind themselves towards one another." *Ibid.*

[31] *Ibid.* at 92. Collins writes: "The second conception of privacy insists that an individual owes no legal obligations to intimates ... legal rights and duties are inappropriate for social and domestic relations." *Ibid.*

[32] *Ibid.* at 95.

For further clarification, it is worth quoting Collins at length. He writes:

> "I think that to speak of contradictions in legal rhetoric is a mistake ... the terms strangers and intimates define themselves in opposition to each other. Their meaning depends upon the sense of contrast ...".[34]

He goes on to say:

> "In this realm of legal rhetoric, the concepts of intimacy and estrangement threaten to subvert each other's values, yet they depend upon each other implicitly for their meaning. In this sense, they function as dangerous supplements to each other."[35]

He concludes with the assertion that:

> "As soon as strangers become intimates, because they are constituted as parties to an agreement or are treated as neighbours, they must become strangers again in order to escape the objections to legal invasion of intimacy. Only when they can be regarded as both strangers and intimates at the same time can they escape the rhetorical concern for privacy and enter the world of private legal obligations."[36]

What each conception asserts is that public intervention has no place where the relationship is such that the individuals' respective growth will suffer more than it will benefit from state intervention. Thus, the question becomes one of productivity and growth rather than public/private; and, the same tests can be used in the case of strangers and intimates.

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[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.* at 98.

With a productivity-linked interpretation, Mill's harm principle fits more smoothly with his assertion that the state's authority begins where the state is chiefly interested and ends where the individual is chiefly interested. One may decide whether state action is appropriate by asking whether the individuals in a particular relationship will be enabled or limited by a particular state intervention. Rather than discussing the intervention in purely theoretical terms, such an approach facilitates practical consideration of whether a particular intervention helps or hinders a particular relationship.

The focus on productivity also deals better with a common criticism of the public/private distinction, i.e. that public and private are not analytical categories at all.[37] For example, "Is the state intervening or not intervening if it allows a deceased man's same-sex lover instead of his parents to make funeral arrangements?"[38] The public/private distinction provides little direction. Depending upon the reasons one marshals, the question could be deemed to fall in either realm. The public/private distinction will either leave the society in or out and either the needs and interests of the homosexual lover or the parents will be ignored.[39]

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[37] As Olsen writes: "On the second level of criticism, 'public' and 'private' are shown not to be analytic categories at all. On this level of critique, the problem is not just that private actions can be made to look like state action and vice versa, but rather that there really is no way to say that certain action is private action." Olsen, *supra*, note 28 at 324.

[38] *Ibid*.

The reason the productivity focus is preferable is that it directs intervention/non-intervention based upon what is best for those involved, not upon artificial categories which apply regardless of who is involved. As Olsen writes:

> "[the] important critical point is that injustice cannot be justified by means of the public/private distinction."[40]

If the needs and interests themselves are considered there is a better chance that justice will be done.

Thus, with a productive interpretation of the harm principle and the public/private distinction the productive approach creates a kind of workable paradox. The evolution the productive approach suggests should have the effect of making the law both more public and more private at the same time. As there is more emphasis on decisions being made privately, i.e. by individuals within relationships, the society intervenes less in the outcome of conflict resolution. In this way the "private" realm grows.

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[39] As Olsen writes: "The point is not that everything should be public or that everything should be private; nor is mere tinkering around with the details of what belongs in the public category and what belongs in the private category likely to bring about significant and far-reaching improvement in the role and status of women [or others who are in the minority or without objective power]. What the best versions of the feminist critique of the public/private distinction try to achieve is a rethinking of how the categories 'public' and 'private' are structured, a deeper analysis of how the status quo is maintained, and new approaches to theorizing social change." *Ibid.* at 327.

[40] *Ibid.* at 325.

However, at the same time, there is more concern that all people receive the different information, resources and subjective power they need to make and implement decisions that are effective for their needs and interests. Also, there is more concern that individuals be held accountable in both private and public for the consequences of their actions. As such the "public" realm grows.

6. The Principle of Fallibility

As individuals and society begin to change their mind set on the nature of conflict and how it is to be dealt with, there is an important principle which can facilitate the evolutionary process. This principle is the principle of fallibility. The principle of fallibility was articulated by Mill in the following way:

> "Unfortunately for the good of mankind, the fact of their fallibility is far from carrying the weight in their practical judgment which is always allowed to it in theory; for while everyone well knows himself [herself] to be fallible, few think it necessary to take any precautions against their own fallibility, or admit the supposition that any opinion of which they feel very certain may be one of the examples of the error to which they acknowledge themselves liable."[41]

Non-compliance with this principle is seen everyday in human interactions. People want the world to be better and this requires change; but, people often refuse to acknowledge that some of the things they are doing may be the very things that require adjustment. If society, and the individuals within it, want peace and productivity as the end goals of a dissension resolution system, then they must be prepared to change. They must look at themselves within their relationships and be prepared to reject their own adversarial attitudes, assumptions of infallibility, and other behaviour which is inconsistent with peace and productivity.

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[41] Mill, *supra*, note 1 at 17.

As Mill goes on to explain the principle of fallibility:

> "There is the greatest difference between presuming an opinion to be true because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation."[42]

Additionally, he states that:

> "it is not the feeling sure of a doctrine (be it what it may) which I call an assumption of infallibility. It is the undertaking to decide that question for others ..."[43]

These insights have important implications for the structure of dissension resolution systems.

Consider the adversarial system as an example. It is true that adversarial dispute resolution allows both sides to be heard. However, both individuals must present their issues (not needs or interests) in a prescribed form which presumes one will win and the other will lose. Both parties are required to assert their rights, positions, or opinions, as true and not subject to refutation by the other. To the extent possible they are to discredit the position of the other person. The aim for the victor is to have his or her attitude of infallibility supported by the court. As for the loser, the court's function is to decide the questions for him or her.

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[42] *Ibid.* at 18.

[43] *Ibid.* at 22.

As Mill recognized, for people to:

> "refuse a hearing to an opinion because they are sure that it is false is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility."[44]

In the adversarial system the individual is removed from direct participation, effectively silencing him or her in many ways; and, the purpose of the court decision is to make it clear and conclusive that one position may be followed while the other cannot be. One of the people will be free to pursue his own good in his own way, the other will be impeded or limited in her efforts to obtain her own good in her own way.

To be clear, in the productive approach, the focus for the principle of fallibility is the design of the adversarial system. While the principle of fallibility may also speak to the possible attitudes of the lawyers, judiciary, etc., this is not the main application being considered. All human systems can have errors made within them. The question asked by the productive approach is whether the design of the justice system amplifies or reduces infringement of the principle of fallibility.

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[44] *Ibid.* at 17.

Mill acknowledges that there may be those who would object to his principle of fallibility. They would say that people are capable of judgment and that the principle of fallibility could only result in no action, for fear of error. If such judgments limit growth in others it is acceptable if those placing the limitations are quite sure they are right. The objectors would say that "[w]e may, and must, assume our opinion to be true for the guidance of our own conduct; and it is assuming no more when we forbid bad men to pervert society by the propagation of opinions which we regard as false and pernicious."[45]

However, if the goals of dissension resolution are peace and productivity then steps must be taken to avoid actions that reduce options and to promote actions that improve the lot of all concerned. Limiting the growth of others is never appropriate where a more productive alternative is possible. Now, due to human fallibility, there will inevitably be some steps taken on behalf of "progress" that are later found out to be in error. What is not inevitable is how the errors are dealt with once discovered; and, how easy or difficult the system design makes it to question possible errors. The problem with an adversarial mode of reasoning, and the imposition of objective power by those who have it over those who do not, is that it ignores the possibility that the most enabling position or the "truth" may consist in a balance between two positions. This balance cannot be achieved if one version of the "truth" remains unheard. "[T]here is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices".[46]

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[45] *Ibid.* at 18.

7. Truth, Facts and Reason in the Productive Approach

Mill asserts that wherever a difference of opinion is possible the truth often depends upon attaining a balance between two conflicting sets of reasons.[47] This points to a view that does not restrict "truth" to objective criteria external to the individual. "Truth" also takes on a meaning derivative from the individuals and from each particular relationship. The world view of the individuals involved; how these views are compared and contrasted with others they relate to; and the societal context in which they must relate: all have a bearing on the nature of "truth", "facts" and "reason" in the productive approach.

If the productive approach is to return responsibility for conflict resolution to the people involved, comply with the principle of fallibility, respect the relationship dynamic of conflict, and evolve in the numerous other ways set out above, then the justice system must give more credence to each individual's view of truth, fact and reason. In the same way, individuals must give respect and credence to the views of other individuals and the society in which they live. All must be respected and at the same time all are subject to critical review. Thus, "truth", "fact" and "reason" are composed of objective, subjective and relational components. For purposes of the productive approach they are defined as that combination of components which best enables productive growth.

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[46] *Ibid.* at 49-50. Mill also writes: "... only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth. When there are persons to be found who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence." *Ibid.* at 46.

[47] *Ibid.* at 35.

8. Rights in the Productive Approach

In Autonomy, Nedelsky realized that, if her vision of autonomy was to be achieved, a more flexible approach to rights would have to be adopted. She wrote:

> "Here I want to focus on a particular dimension of our current conception of autonomy that stands in the way of the necessary transformation: the dichotomy between autonomy and the collectivity. This dichotomy is grounded in the deeply ingrained sense that individual autonomy is to be achieved by erecting a wall (of rights) between the individual and those around him ... The most perfectly autonomous man is thus the most perfectly isolated. The perverse quality of this implicit ideal is, I trust, obvious."[48]

Instead of such an approach, rights must be seen as guiding principles for relationships between equals, principles which lead to productivity in relationship.

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[48] Nedelsky, Autonomy, *supra*, note 2 at 12.

In a subsequent article, Nedelsky revisits the idea of rights and attempts to place an understanding of rights in the framework of relationship.[49] She discusses how it is possible to consider rights as barriers protecting one individual from the infringements of others, effectively promoting liberty through isolation; or, to see the essence of autonomy and its actualization as achievable only through relationship.[50] This latter approach "shifts the focus from protection against others to structuring relationships so that they foster autonomy."[51]

Although Nedelsky does not express it in such terms, what she is advocating is the construction of productive methods of dissension resolution; ones which focus on needs, interests and the return of decision making into the hands of those individuals that are to be directly affected by the outcome of the dissension. She asserts that:

> "The human interactions to be governed are not seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy."[52]

Consequently, what is needed is not a shift away from rights and interests to autonomy. Rather, it must be a shift to needs and interests *through* the concept of autonomy and rights which are composed of the individual and social dynamics of human beings seated in a context of relationship.[53]

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[49] Nedelsky, Rights, *supra*, note 2.

[50] *Ibid.* at 7-8.

[51] *Ibid.* at 8.

[52] *Ibid.*

Following a similar train of thought, rights in the productive approach are seen as means, but not the only means, by which the government, society and justice system can foster autonomy. Rights must remain flexible enough to respond to the evolving needs and interests in a plural society. If the focus of the dissension resolution process is upon the nature of each individual's rights, then the needs and interests those rights were meant to achieve are never directly discussed. The problem is that it is their needs and interests which are most important to individuals. If one had no needs or interests, then rights, and any actions based upon them whatsoever, would be unimportant. Therefore, one ought to resolve conflicts of needs and interests by discussing needs and interests.

Once rights and dissension resolution are seen through the dynamic of relationship the manner of approaching rights and dissension resolution take on a new, and more proper, focus. As Nedelsky summarizes:

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[53] In Nedelsky's words: "The constitutional protection of autonomy is then no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined." *Ibid.*

> "there will almost certainly still be people who want the kind of relationships of power and limited responsibility that the individualistic liberal rights tradition promotes and justifies. But at least the debate will take place in terms of why we think some patterns of human relationships are better than others and what sort of 'rights' will foster them."[54]

9. Justice in the Productive Approach

It may be said that justice in the productive approach can be equated with the fulfilment of needs and not only with issues of fair procedure.[55] Therefore, the justice system should focus upon productivity in relationships and procedural fairness. Wherever possible it should aim to improve the lives of the individuals through improvements to the efficiency and productivity of their connections within society.

It has been asserted that the best hope for such aims to be achieved may rest in the potential of due process. Of this possibility Nedelsky says:

> "The chief contributions of the law are to be found in the 'due process explosion' ... The opportunity to be heard by those deciding one's fate, to participate in

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[54] *Ibid.* at 14.

[55] This is a view shared by Iris Marion Young, who writes: "Political thought of the modern period greatly narrowed the scope of justice as it had been conceived by ancient and medieval thought. Ancient thought regarded justice as the virtue of society as a whole, the well-orderedness of institutions that foster individual virtue and promote happiness and harmony among citizens. Modern political thought abandoned the notion that there is a natural order to society that corresponds to the proper ends of human nature. Seeking to liberate the individual to define 'his' own ends, modern political theory also restricted the scope of justice to issues of distribution and the minimal regulation of action among such self-defining individuals ... While I hardly intend to revert to a full-bodied Platonic conception of justice, I nevertheless think it is important to broaden the understanding of justice beyond its usualXlimits in contemporary philosophical discourse." Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 33.

> the decision at least to the point of telling one's side of the story ... The right to a hearing declares their views to be significant, their contribution to be relevant ... Inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence and power.[56]

The problem with the due process approach, and its viability as a response to the demands of autonomy and productivity, is that power remains external to the individual in conflict. The due process approach is driven by objective power. Exercise of the objective power may be delayed until the external decision making authority has heard from the individuals in dissension but the locus of decision making remains with the objective power wielder.[57]

Rather than taking the full step, and returning the opportunity and responsibility for decision making into the hands of the parties involved in dissension, Nedelsky continues to rely upon the judiciary. She writes:

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[56] Nedelsky, Autonomy, *supra*, note 2 at 27.

[57] Nedelsky seems to acknowledge this facet but remains apparently unconcerned about its implications. She writes: "The opportunity to be heard by *those deciding one's fate*, to participate in the decision at least to the point of telling one's side of the story, presumably means not only that the *administrators* will have a better basis for *determining what the law provides* in a given case, but that the recipients will experience their relations to the agency in a different way. The right to a hearing declares their views to be significant, their contribution to be relevant. In principle, a hearing designates recipients as part of the process of collective decision-making rather than as passive, external objects of judgment. Inclusion in the process offers the potential for providing *subjects of bureaucratic power* with some effective control as well as a *sense of dignity, competence and power*." [all emphasis added] *Ibid.* at 27.

From the emphasized passages one sees that the administrators retain the decision making. While they are forced to listen to the participants the decision is still based upon what the administrators determine and is not primarily directed at productively reconciling the needs and interests of those involved in the relationship. It may give the individuals a sense of power but the actual power base does not shift. Unlike the productive approach, there is no central effort to evolve the power basis from objective power to relational and subjective power.

> "My argument is that recognizing rights as relationship only brings to consciousness, and thus open to considered reflection and debate, what already exists. Here I join a growing chorus of voices that urge that judges will do a better job if they are self-conscious about what they are doing, even if that new self-consciousness seems very demanding."[58]

On the question of the role of the courts in giving effect to collective choices and values and how those choices affect the individual she further writes:

> "Courts have traditionally expressed those shifting collective choices [regarding values] in terms of rights, but we must recognize rights to be just that: terms for capturing and giving effect to what judges perceive to be the values and choices that 'society' has embedded in the 'law.'"[59]

Her suggestions for the production of a more enlightened judiciary should not be undervalued. However, they fall short of what is needed if diverse individuals are to be truly empowered and put in a position where they can resolve their conflicts productively. Educating those who drive the justice system is a necessary step but not a sufficient one. To achieve a truly productive response to conflict resolution the evolution must go farther.

Thus, to recap, it is not clear how due process replaces objective power with relational and subjective power; nor, that it is ever intended to do so. It is also not clear how autonomy can grow in a scenario which continues to view the individual/societal relation as one of dependence. Although Nedelsky has her own reasons for pursuing the dependency conception of relationships,[60] such a view of relationship is not helpful in the productive approach.

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[58] Nedelsky, Rights, *supra*, note 2 at 19.

[59] *Ibid.* at 4.

Advocates of the productive approach postulate that the relationship between individuals and society is one of interconnectedness, not dependence. A focus on interconnectedness accomodates the return of decision making into the hands of the individuals involved in a way that a dependence analogy cannot. An interconnectedness approach proceeds from the basis that all are innately entitled to pursue their needs and interests. The individuals' opportunity to pursue their goals from a relationship perspective doesn't depend upon the benevolent exercise of objective power. The productive approach stresses the idea that the good motives of the collective cannot replace respect for an individual's right to choose for him or herself.

In a case of a *de facto* dependency relationship, efforts should be made to provide as much information and as many resources as the individual is capable of benefitting from. To the extent that the *de facto* dependent individual is empowered she or he will become capable of making more of her or his own decisions. To the extent that the person remains dependent the decisions that will be made for her or him should strive to meet the individual's needs and interests as required for growth. As will be discussed in Chapter Five, the productive approach does not assume an elimination of all external decision making. There will be instances when external decision making is required. However, when external decision making is required it should follow productive principles rather than adversarial ones.

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[60] It may be the case that Nedelsky hopes to examine dependence relationships upon the assumption that individuals and society are all dependent upon one another. Then, if she can provide a way to see differently those relationships which appear to be the most dependent she may create a basis to see differently all relationships of dependence.

10. Government and Justice System Obligations to Further the Evolution of Productive Conflict Resolution

A productive approach includes flexibility of rights, more personal involvement in decision making and other factors which tend to lessen the direct control of the state over the outcomes of conflict resolution. However, it should be clear that it does not include an elimination of laws, government or justice system involvement in conflict resolution. What the productive approach reflects is an evolution in the focus of control and involvement.

As Nedelsky points out:

> "There is a real and enduring tension between the individual and the collective, and any good political system will recognize it. The problem with our tradition is that it not only recognizes, but highlights the tension, and has a limited view of the non-oppositional aspects of the relation and of the social dimension of human beings."[61]

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[61] Nedelsky, Autonomy, *supra*, note 2 at 21.

How then can the society lessen its coercion over individuals and at the same time exercise coercion to stimulate and ensure the evolution of a productive justice system? The answer to this question parallels the "workable paradox" discussed above in connection with the public/private distinction. As more emphasis is placed on decisions being made within relationships, the laws and system interventions will be directed less toward the specific outcomes. However, at the same time, the laws and system interventions should become more concerned with ensuring that all people receive the different information, resources and subjective power they need to make decisions that are effective for their needs and interests. In support, and further explanation, of these contentions one may refer to the work of Joseph Raz, *The Morality of Freedom*.[62]

Raz explains that those who advocate the state's involvement in selecting, promoting or enforcing some particular forms of life over others can be usually said to embrace some, although perhaps limited, form of perfectionism. Those who oppose such state involvement can be collectively referred to as anti-perfectionists.[63] The anti-perfectionist view asserts that the government should be neutral with regard to various ideals of the good life.[64] They deny the government's right to pursue certain valuable goals or alter certain states of affairs even though the government may make improvements if it was to make the attempt.[65] "The doctrine of political neutrality is a doctrine of restraint for it advocates neutrality between valid and invalid ideals of the good."[66]

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[62] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

[63] "The anti-perfectionist principle claims that implementation and promotion of ideals of the good life, though worthy in themselves, are not a legitimate matter for governmental action." *Ibid.* at 110.

In the anti-perfectionist position there are really two approaches: the first is one which advocates that the state remain neutral between various ideals; the second one focuses on an exclusion of ideals from government consideration and forbids the government to act for certain reasons.[67] Non-neutrality, or discrimination, between ideals makes it easier for some people to realize their goals and pursue their ideals of the good than it is for others.[68] The idea of state neutrality between ideals allows individuals to act to realize their particular ideals in their own lives; "[b]ut no planning regulation may be passed, no law ... which will make it easier to realize one conception of the good or more difficult to pursue another."[69]

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[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.* at 134-35.

[68] *Ibid.* at 112.

However, the assertion that acting neutrally is the same as acting fairly is a misguided one.[70] It ignores the fact that people experiencing dissension in a relationship have needs which may not be being met equally, or abilities which cannot be employed equally. A system which attempts to help or hinder people equally risks ignoring the possibility that the prior relationship dynamics may have always been in an imbalance with respect to the needs of the parties. The decision to be "neutral" requires as much justification as any other action.[71] Productive conflict resolution would enable the parties to make the necessary changes to develop a fulfilling and empowering relationship. Depending on the circumstances one of the parties may have to make more changes than the other. As long as the required changes can be pursued in safety and are directed at the individual's growth, there should be few valid objections.

To some degree, anti-perfectionism emerges from the belief that imposing one's conception of the good on others is offensive and disrespectful to them.[72] But a poignant question asked by Raz is:

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[69] *Ibid.* Also, see John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971) c. 50, for a discussion critical of the principle of perfection.

[70] Raz, *supra*, note 62 at 114.

[71] *Ibid.* at 118.

[72] *Ibid.* at 157.

> "Is one treating another with respect if one treats him [or her] in accordance with sound moral [or productive] principles, or does respect for persons require ignoring morality [or productivity] (or parts of it) in our relations with others?"[73]

The productive approach submits that one can require productive conduct from others without imposing upon their dignity or acting with disrespect towards them. The choice not to take a productive stand in the face of dissension is, in itself, taking a stand.

When Raz goes on to discuss limits on government intervention within a perfectionist framework, he emphasizes the role of autonomy and what it can do for individuals seeking their own ideal vision of the good. Raz writes:

> "The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."[74]

However, in the realm of legal and government intervention, and in connection with morality, Raz states that autonomy does not require the government to make evil and repugnant choices available so that people can freely choose to avoid them.[75] What autonomy requires is the availability of morally acceptable options. Similarly, when peace and productivity are the goals, autonomy does not require the government to make destructive choices available. If the legal and justice system theory invoked is a pluralistic one, one which recognizes that each individual has an equal but different set of productive paths that she or he can follow, then the limitation on destructive responses to dissension does not eliminate autonomy.[76] The limits that are placed on choice are not limits stemming from perfectionism per se. They are the limits that any society or individual must face if it, he or she, wants to live productively.

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[73] *Ibid.*

[74] *Ibid.* at 369.

[75] *Ibid.* at 380.

Rather than following Raz's discussions any further, what can now be pointed out is how legislative limits on the range of choices available to citizens is compatible with freedom, autonomy and respect for the individual. With regard to dissension resolution, to the extent that the government has the capacity to establish productive ways of handling dissension it should do so. Maintaining an adversarial system is not necessarily neutral or fair. While the government should proceed with caution and as much foresight as possible, that is no reason to hold that it should not proceed at all.

This is a sentiment echoed by Nedelsky, who asserts that a democratic society's task in assuming "collective responsibility for individual welfare"[77] should be focused on implementing its authority in ways that "foster rather undermine citizens' sense of their own competence, control, and integrity."[78] What Nedelsky is calling for is productive and enabling use of power, i.e. the development of relational and subjective power. She goes on to propose that the proper focus would be to set up guidelines and principles for autonomy that enable it to grow within the overall setting of collective power, rather than setting up individual autonomy as oppositional to collective power which emphasizes rights as barriers to collective action.[79]

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[76] On this line of thought see *Ibid.* at 380ff.

Given such an approach, society will continue to have laws of general application which set out the interests of the collective. This provides individuals in conflict with guidelines they can follow and provides some predictability as to whether their contemplated actions are likely to be acceptable to those around them. Laws of general application also prevent the interests of the collective from being indifferently overridden by the actions of a few individuals who wish to resolve their conflict. In certain cases the interests of the collective may be involved in "private" conflict resolution; however, it would be impractical or impossible for the collective to renegotiate its interests in every dispute.

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[77] Nedelsky, Autonomy, *supra*, note 2 at 13.

[78] *Ibid*.

[79] *Ibid*.

For example, in a custody, access and child maintenance conflict, it is in society's interest that the children are adequately provided for. If the children's interests are not being adequately considered by the parents, and the child cannot act, then the state must act. To refuse to do so results in harm to the child, i.e. the child's growth suffers more by the state's non-intervention. Also, if the parents do not provide for the children the state will either have to abandon them or provide adequate support. As such, child protection and maintenance laws to guide (and to some extent limit) the actions of the parents are acceptable and desirable in the productive approach. This is because the laws enhance the growth of the people involved (specifically the children in this example) and do not focus upon control of the parents.

Finally, where dissension does arise, it is also possible for the collective to have in place a dissension resolution mechanism which recognizes that its actions shape the individuals within it. If the system is to be truly respectful of difference, the dissension resolution mechanism must focus upon productive conflict resolution. With the brief look at Raz what one discerns is a basis for saying that the government is within its proper powers to act to promote and enable its citizens to lead more productive and peaceable lives. If this may be done through revision to the dissension resolution process employed in the state, then the government has the legitimate power, and perhaps the duty, to implement the necessary changes.

As such, the productive approach meets some of the demands of both perfectionism and anti-perfectionism. It retains a significant degree of neutrality regarding the various ideals of the good life that individuals possess. However, at the same time, it follows that not all options should be available in a system whose goals are peace and productivity. Instead, emphasis is shifted toward ensuring better opportunities for all individuals to pursue their particular vision of the good life; and, to reconcile that view with the views of others when relationships lead to conflict.

Chapter Four:

Evolving a Peaceful and Productive Conflict Resolution System Through Adversarial Paths

1. The Adversarial System and the Principle of Partisanship

The adversarial system is complex and a comprehensive discussion of it is beyond the scope of this paper. Accordingly, the focus of this chapter will be primarily on the principle of partisanship. The principle of partisanship has been chosen because of its central and directive role in the functioning of the adversarial system.

It has been observed that the lawyers' principal role and goal stems from the philosophy of an atomistic individual standing alone against the world.[1] Room for compromise, or consideration of the interests of the other party, are limited to instances where compromise and consideration will concurrently bring the best results to the lawyer's client.[2] As written by David Luban:

> "The adversary system of justice ... lays the responsibility on each party to advocate its own case

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[1] See Chapter Three for discussions surrounding this point. And, see Luban, supra, Chapter 1 note 23 c. 4.

[2] See Luban's discussion of this point and his assessment that no holds barred zeal is appropriate for the courtroom and also for the solicitor negotiating a deal on behalf of his or her client. In the case of negotiation the solicitor may act amicably and with fairness towards other parties; but only if it is seen as the best way to maximize results for the client. "[I]n a business setting, making everybody happy is [or may be] how you maximize the likelihood that the client will get what she wants, and so the principle of partisanship is still being honored." However, if the lawyer's client instructs the lawyer to act unfairly toward one or more of the client's competitors, then the lawyer must do so to the extent the law allows. *Ibid.* at 11-12.

> and to assault the case of the other party. Since this battle of arguments is conducted by lawyers, they have a heightened duty of partisanship toward their own clients and a diminished duty to respect the interests of their adversaries or of third parties."[3]

This statement discloses the thinking behind the adversarial system and the principle of partisanship; and, the incompatibility of partisan advocacy and productive conflict resolution. In such an approach each individual in dissension is required to adopt an attitude contrary to the principle of fallibility. Each side must act as if their position is the only one in the world that matters. The other's interests are considered only to the extent that they can be anticipated and more effectively destroyed.

This leads Luban to define the principle of partisanship as follows:

> "A lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained."[4]

However, without exploring the meanings behind such a definition its essence is lost. The "established constraints on professional behavior" have much latitude for interpretation. While a lawyer cannot commit a crime in pursuance of a client's interests, the lawyer can, and perhaps must, use every other effort to advance her or his client's interests.[5] But there is little control on the nature of "every other effort" that may be used. Too often the "ends" of partisanship justifies what would be questionable means used in other contexts. As Luban states: "The obvious problem with this principle is that it sets aside the question of whether the client *should* prevail."[6]

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[3] *Ibid.* at xx.

[4] *Ibid.* at 12.

One may see the consequences of partisanship thinking in the manner in which lawyers' professional codes of conduct have been drafted. Effectively, what one sees are codes that have been framed to meet the demands of partisanship; rather than partisanship activities being modified to fit some acceptable view of ethical (or productive) behaviour. This is confirmed by Chapter IX of The Canadian Bar Association Code of Professional Conduct,[7] which states:

> "When acting as an advocate the lawyer must treat the tribunal with courtesy and respect and represent the

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[5] Luban writes: "A lawyer can't, because of the principle of partisanship, bribe a juror, because it is against the law. But this still leaves plenty of latitude for meretricious argument, a weeping client, and some good, old-fashioned righteous indignation - and, according to the principle of partisanship, she not only can but *must*, if doing so will 'maximize the likelihood that the client will prevail.'" *Ibid.*

[6] *Ibid.* From the standpoint of the productive approach the client should prevail only so long as the result is the most productive one possible for the parties involved in the dissension relationship.

[7] The Canadian Bar Association, *Code of Professional Conduct* (adopted by Council on August 25, 1974, superseded by a revised Code adopted August 1987), hereafter the "CBA Code". The CBA Code has been chosen as a focus because it represents a broad range of lawyers' current attitudes to the ethics and methods of practice. The CBA is a national organization of Canadian lawyers. When the CBA Code was drafted and adopted there was opportunity for national input into its terms. While it is not binding on the individual provincial and territorial law societies it has formed the basis for the codes of professional conduct in at least ten of the twelve provinces and territories. For a discussion of the adoption and revision of the CBA Code in the provinces and territories up to 1989 see: Beverly G. Smith, *Professional Conduct For Canadian Lawyers* (Toronto: Butterworths, 1989) generally; and, specifically at p. 5, footnote 7.

> client resolutely, honourably and within the limits of the law."[8]

The CBA Code goes on to comment upon this rule and states that:

> "The advocate's duty to the client 'fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case' and to endeavour 'to obtain for his client the benefit of any and every remedy and defence which is authorized by law' must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect."[9]

The lawyer need not concern herself about injuring the other party as long as this is not the sole purpose of the action. It is also interesting to note that the exhortation to the lawyer requires candour, fairness, courtesy and respect to be shown to the court but not specifically to the opposing party.[10]

Further, it would appear that the lawyer is at liberty to abuse, harass and inconvenience a witness to further his or her client's ends; providing that the abuse, harassment and inconvenience can be seen as needful and not illegal. This conclusion is based upon CBA Code, Chapter IX, Commentary 2.(k) and (l) which state that the lawyer must not "(k) needlessly abuse, hector, or harass a witness" or "(l) needlessly inconvenience a witness."[11] When the lawyer's goal is to zealously advance his or her client's interests such a justification may not be hard to come by. The aim to advance the interests of the client and to do whatever is necessary, short of illegality, leaves productivity, if it is achieved at all, to be achieved by coincidence rather than by design.

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[8] CBA Code, Chapter IX. The Law Society of Saskatchewan Code of Professional Conduct (Adopted by the Benchers of The Law Society of Saskatchewan in Convocation on September 26, 1991, to be effective on October 1, 1991), hereafter the "LSS Code", reads: "When acting as an advocate, the lawyer must treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law." LSS Code, Chapter IX. And, The Law Society of Alberta Code of Professional Conduct (Effective January 1, 1995), hereafter the "LSA Code" reads: "When acting as an advocate, a lawyer has a duty to advance the client's cause resolutely and to the best of the lawyer's ability, subject to limitations imposed by law or professional ethics." LSA Code, Chapter 10.

[9] CBA Code, *supra*, note 7 Chapter IX, Commentary 1. The LSA Code, *supra*, note 8 makes some advances on this point by stating, in Chapter 10, Rule 21: "A lawyer must treat with fairness all witnesses and others involved in a matter." The LSS Code, *supra*, note 8 is a repetition of the CBA Code (LSS Code, Chapter IX, Commentary 1).

[10] CBA Code, *supra*, note 7 Chapter XVI, states that: "The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith." However, this still provides no obligation to treat the opposing party with courtesy, good faith or respect.

This conclusion is supported by Deborah L. Rhode[12], who observes that underlying the principle of partisanship is a premise that dissension is to be resolved through a combative scheme of social ordering. "The premise is that 'truth' or the 'right' result is attainable through competitive presentations of relevant factual and legal considerations."[13] But, given the discussions in Chapter Three, this premise is at least questionable and perhaps wholly inappropriate.

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[11] *Ibid.* Chapter IX, Commentary 2.(k) and (l). The LSA Code alters this somewhat by stating: "A step taken for the sole purpose of embarrassing, inconveniencing or harassing another party is improper." LSA Code, *supra*, note 8 Chapter 10, Commentary 1. The LSS Code, *supra*, note 8 is, again, identical to the CBA Code (LSS Code, Chapter IX, Commentary 2.(k) and (l).

[12] Deborah L. Rhode, (1985) 37 "Ethical Perspectives on Legal Practice" *Stanford Law Review* 589.

[13] *Ibid.* at 595.

Defense of the adversarial system on the basis of protection of individualist concerns is also weakened when one realizes that there are many disputes where the concerns at issue may not justify the legal expense to proceed. Alternatively, one or both of the disputants may not be able to afford the legal services necessary to proceed in an adversarial forum.[14] There is little protection for the concerns of the individuals in these cases. If the adversarial system is to be the major method of dispute resolution in our society, then it should be capable of addressing the majority of disputes which arise. It is not sufficient for a supporter of the adversarial system to argue that it deals fairly with the cases that do come before it - even assuming the claim is true - and simply ignore the numerous cases that it cannot practically deal with. If one believes people are equal and wishes to promote productive dissension resolution there must be an effective way to deal with the "little" conflicts as well as the "large" ones.

2. Traditional Justifications for the Principle of Partisanship and Their Implications

Initially, the principle of partisanship was justified based upon a narrow sense of what the adversary system entailed.[15] However, it has been broadened to affect the lawyer-client relationship as a whole. As a result, everything the lawyer does for the client is affected by the principle of partisanship, including negotiation and client counselling.[16] In these extended areas, the safeguards of an impartial arbitrator are no longer present.[17]

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[14] For further discussion on this point see *Ibid.* at 608-12.

The reason the principle of partisanship affects (infects) the entire lawyer-client relationship, is that it looms forever in the background as the default position. In the current justice system, if a negotiation fails the matter will go to an adversarial trial. As one considers options, what must be kept in mind is the fact that the ultimate test will be whether one's decisions stand up in court. As a result, one does not offer too much, disclose too much or act upon advice that makes one's position weaker than it could otherwise be. A weakness during the early stages of the dispute resolution will be turned against the individual in subsequent proceedings.[18]

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[15] In this connection it has been argued that the principle of partisanship is justified in that the adversarial system demands it for its proper functioning. In Luban's words: "Each side of an adversary proceeding is represented by a lawyer whose sole obligation is to present her side as forcefully as possible; anything less, it is claimed, would subvert the operation of the system." Luban, *supra*, Chapter 1 note 23 at 51.

While this statement may be an accurate one, i.e. the adversary system may depend upon rigorous partisanship, it is insufficient as a defence of the principle of partisanship since it begs the question. The fact that the adversary system depends upon the principle of partisanship, and vice versa, says nothing about whether either one is desirable.

[16] For Luban's views on this point see *ibid.* at 57-58.

[17] *Ibid.* at 57.

In her work, Rhode distinguishes two categories of justification for an undivided partisanship approach to dissension resolution. The first category contains justifications centred around the belief that the adversarial process and the principle of partisanship are the best available means to achieve certain results within the law.[19] Three areas where it is claimed that the adversary system and the principle of partisanship achieve enhanced results are: i) the pursuit of truth, ii) the defense of rights, and iii) efficiency through role specialization.

The pursuit of truth justification claims that the partisanship advocacy is the best means of uncovering the truth.[20] What must be recognized here is that the truth being pursued is objective truth. The partisan advocacy justification proceeds in a manner analogous to a scientific rationality approach which relies upon the dialectic of assertion and refutation. However, the problem, as Luban points out, is that the scientific method doesn't proceed by advancing conjectures known to be false and then apply rules to exclude probative evidence or attempt to discredit valid findings.[21] In the adversarial system each lawyer attempts to present facts consistent with his or her client's case while preventing or minimizing evidence to the contrary and undermining the credibility of witnesses giving damaging evidence.[22] There is no guarantee that such a process will uncover the truth. As discussed in Chapter Three, Part 7, the nature of truth is quite possibly tripartite consisting of subjective, relational and objective elements.[23] If this is so, it makes the adversarial system even less apt for the discovery of truth.

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[18] The analogy of the prisoner's dilemma, discussed in Part 3, will explain how the individual who co-operates in the early stages of negotiation can be taken advantage of by one who responds aggressively in subsequent stages of negotiation. The prisoner's dilemma analogy will also discuss possible solutions to avert the possible harm to the co-operative individual and keep the dissension resolution on a co-operative and productive track.

[19] Rhode, *supra*, note 12 at 594. The second category contains justifications which refer to the principle of partisanship and the adversarial process as the preferable approach to promoting individualist values and safeguarding private spheres of dignity and autonomy. This category of justification will be discussed below.

[20] However, this view is not shared by Judge Marvin E. Frankel. In his often quoted article ("The Search for Truth: An Umpireal View" (1974-75) 123 *University of Pennsylvania Law Review* 1031) he writes: "My theme, to be elaborated at some length, is that our adversary system rates truth too low among the values that institutions of justice are meant to serve." *Ibid.* at 1032.

On the contrary, rules of evidence which reject relevant information because it is improperly presented, for example, assure results consistent with goals or concerns other than finding even the "objective" truth.[24] For example, refusal to hear evidence on points relevant to the conflict because of an oversight in pleading may ensure adequate disclosure of the case but will not necessarily discern the truth.

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[21] Luban, *supra*, Chapter 1 note 23 at 69.

[22] *Ibid*.

[23] It should be noted that Frankel is referring to objective truth in his analysis. One of Frankel's critics, H. Richard Uviller ("The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea" (1974-75) 123 *University of Pennsylvania Law Review* 1067) states: "What troubles me ... about the Frankel Formulation is his unrefined employment of the concept of Truth as though he perceived it in bold silhouette. Judge Frankel certainly requires no instruction on the plural forms and multifaceted aspects of that beguiling concept. Yet he chooses to treat it as a flat fact. He has afforded little guidance to the sort of truth he alludes to, nor to the conditions in which he regards its place as paramount." *Ibid*. at 1076. However, it would appear that Uviller's observation would strengthen Frankel's criticism of the adversary system rather than weaken it. There is much more room for concern if the adversary system focuses upon only one of the multiple aspects of truth and then is still shown to deal with truth poorly.

A proponent of partisanship advocacy may respond that if the pleadings do not set out the cause of action properly then information bearing upon topics outside the pleadings cannot possibly be relevant by definition. There is some justification for this response. For example, the justice system does not want to promote trial by ambush, the parties are entitled to know the case they have to meet, etc. But what must be remembered is that the drafting of pleadings is an artificial process in the first place. A client brings his or her conflict to a lawyer. The lawyer listens and then, in an effort to distil the conflict into legally significant disputes, attempts to itemize the conflict into litigable issues. Through this culling process points relevant to the overall conflict may be dropped. Thus, it is quite possible for information to be presented which is relevant to the conflict but deemed to be irrelevant to the dispute contained in the pleadings. The problem lies first, in the distinction between conflict and dispute and, second, in an adversary partisan process which attempts to resolve disputes when the people initially come to their lawyers with conflicts.

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[24] In Frankel's words: "we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of truth." Frankel, *supra*, note 20 at 1036. And, in the words of Monroe H. Freedman ("Judge Frankel's Search for Truth", (1974-75) 123 *University of Pennsylvania Law Review* 1060): "We are concerned, however, with far more than a search for truth, and the constitutional rights that are provided by our system of justice serve independent values that may well outweigh the truth-seeking value, a fact made manifest when we realize that those rights, far from furthering the search for truth, may well impede it." *Ibid.* at 1063.

The claim that the adversary partisan process is successful in its pursuit of truth is in some ways odd when one stops to reflect upon what happens in an actual case. Assume a separating couple in conflict over the custody of their children, with both claiming sole custody. The facts of their conflict - how each of them see the situation and what has actually happened - and their needs and interests, are fixed at any point in time. At that fixed point in time either one of them could go into Pat Smith's law office. By the time the trial comes around Pat will be convinced that the client Pat represents should have sole custody. However, had the other parent come into Pat's office first, Pat would have become convinced that that individual should have had sole custody.[25]

The problem is that it is not possible for Pat to believe that both parents should have sole custody, the positions are mutually exclusive. Which view Pat holds will be a consequence of who Pat's client happens to be and the set of "facts" Pat has come to embrace. Pat's view will not be based upon the attainment of some deep objective insight. To some extent the objective truth will be irrelevant to Pat. It is what Pat comes to accept and can convince others to accept that matters.

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[25] Actually there are two possibilities. Either Pat must be convinced that the claims of Pat's client are justified or Pat is not doing a proper job for the client; for, if the arguments are not sufficient to convince Pat then how can Pat hope to convince a judge. Alternatively, Pat will not be convinced and will make the effort to convince the judge anyway. But, in this latter case, what does it say about how the partisan adversary system works with regard to the truth, for example the best interests of the children?

Further, it is no answer to say that all will be made right by a neutral judge hearing both sides of the argument. If Pat's skills as a lawyer exceed those of Pat's adversary (or if the other individual cannot afford a lawyer), then Pat may convince the judge that the position of Pat's client is the superior one even though it is not. With the omnipresent subjective element of truth it is a semantic game for Pat to pretend that some form of objective justice is being served. How likely is truth to emerge from a system which effectively assumes that one of two lawyers that come before the court has been deceived or is trying to deceive? With the ever presence of the subjective element the only honest way to deal with it is to do so directly. This requires a tripartite approach to truth, not a partisan adversarial one.

As well, one must be suspicious of the adversarial system's ability to find truth when there is a major focus on self-interest and victory. In any given instance there can be many paths to victory, truth may or may not be among them.[26] It follows that when one of the main factors in selecting a lawyer is a proven track record for winning, the ability to uncover the truth may or may not be an expertise the lawyer has developed.[27]

As Rhode has stated:

> "The most obvious difficulty with this premise [i.e. that partisanship advocacy is the best method for determining truth] is that it is neither self-evident nor supported by any empirical evidence."[28]

After a trial has concluded the litigants do not come forth to verify whether all of the relevant information was uncovered or to remove any misunderstandings the other party may have developed.[29] Again in Rhode's words:

> "Why assume ... that the fairest results will emerge from two advocates arguing as unfairly as possible on opposite sides? ... That is not the way ... the bar itself seeks truth in any setting outside the courtroom. In preparing for trial, for example, lawyers do not typically hire competitive

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[26] In Frankel's words: "The advocate in the trial courtroom is not engaged much more than half the time - and then only coincidentally - in the search for truth. The advocate's prime loyalty is to his client, not to the truth as such." Frankel, *supra*, note 20 at 1035. And, he goes on to say: "the process often achieves truth only as a convenience, a byproduct, or an accidental approximation. The business of the advocate, simply stated, is to win if possible without violating the law ... His is not the search for truth as such. To put that thought more exactly, the truth and victory are mutually incompatible for some considerable percentage of the attorney's trying cases at any given time." *Ibid.* at 1037.

[27] Again, in Frankel's words: "The ethical standards governing counsel command loyalty and zeal for the client, but no positive obligation at all to the truth." *Ibid.* at 1038. And, he continues by writing: "The litigator's devices, let us be clear, have utility in testing dishonest witnesses, ferreting out falsehoods, and thus exposing the truth. But to a considerable degree these devices are like other potent weapons, equally lethal for heroes and villains. It is worth stressing, therefore, that the gladiator using the weapons in the courtroom is not primarily crusading after truth, but seeking to win. If this is banal, it is also overlooked too much". *Ibid.* at 1039.

[28] Rhode, *supra*, note 12 at 596.

[29] Luban, *supra*, Chapter 1 note 23 at 68-69.

investigators."[30]

While the adversarial system cannot prove its empirical claim at being the best means of determining the objective truth it is also impossible to prove conclusively that it is not the best means. However, one can look at the mechanisms employed by partisan advocates and attempt to be clear on the type of truth they are concerned with. The partisan advocacy system does little to even acknowledge tripartite truth, let alone claim to pursue it. As such, it is clear that partisanship advocacy must be an inferior approach to truth, or at least an inadequate approach, when productive outcomes and tripartite truth are sought.

A second justification for the partisan approach holds:

> "the point of the adversary system is not that it is the best way of getting at the truth, but rather the best way of defending individuals' legal rights."[31]

A problem with this claim is that it talks about rights as if they are somehow stable and fixed.[32] Often a right is general in its tenor, or it is derived from precedent which is not quite on point. The lawyer's job is to take what is given in law and precedent, combine it with his or her client's demands and find a way to enforce that vision on any who would oppose it. The most effective argument will vary depending on the opponent of the day and how that opponent's demands conflict with one's own. Many "rights" that exist today did not exist yesterday and may not exist tomorrow.

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[30] Rhode, *supra*, note 12 at 596-97.

[31] Luban, *supra*, Chapter 1 note 23 at 74.

[32] Alternatively, the realist may claim that rights are only what the court confirms. However, "[i]f legal rights are strictly identical with what the courts decide they are, then it is just false that the adversary system is the best defender of legal rights. Any system whatsoever would defend legal rights equally well" simply by deciding what legal rights are. *Ibid.* at 77.

Even assuming that the partisan adversary system is the best defender of individual legal rights, the claim may be hollow. If, as discussed in Chapter Three, Part 8, rights are best derived through a relationship dynamic, then an individualistic defence of rights is misdirected. Further, as the productivity approach holds, rights only possess instrumental value not intrinsic value. If a right is not capable of generating results which meet the individuals' needs and interests it will be of little consequence to the individuals that the right itself is protected.

A third justification supports partisan advocacy by focusing on the efficiency of role specialization. Partisanship is said to be justified by the presence of another zealous advocate on the other side and an impartial arbiter to provide checks and balances.[33] While individual actions taken in isolation may not be ethical, it is theorized that the combination of all actions taken in the system will be. In Luban's words:

> "The idea is really a checks-and-balances theory in which social engineering or wise legislation is supposed to relieve some of the strain on individual

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[33] *Ibid.* at 78.

> conscience [and responsibility]. A functionary in a well-designed checks-and-balances system can simply go ahead and perform her duties, secure in the knowledge that injuries inflicted or wrongs committed in the course of those duties will be rectified by other parts of the system."[34]

As systems become more complex, interactions occur which are difficult, if not impossible, to foresee. Thus, it is harder to ensure the smooth functioning of the counter balances. If the goals are peace and productivity, why design system components that are aggressive, non-productive and one-sided in the hope that they will cancel each other out in the final analysis leaving one with a co-operative, productive and fair result? Instead, the focus should be on having each part act as co-operatively, productively and relationship oriented as possible. Then, if the system is not working together as well as hoped, there is a better chance that the results will still be productive even though they may not be optimally productive.[35]

The second category of justifications for partisan advocacy, as identified by Rhode, refer to the principle of partisanship and the adversarial process as the preferable approach to promoting individualist values and safeguarding private spheres of dignity and autonomy.[36] Two such justifications are: i) the adversarial system best guarantees human dignity by giving everyone a voice;[37] and, ii) the adversarial system is so interwoven and integral to the fabric of Western society (which is presumed to be the vanguard of fundamental interests of individual privacy and autonomy, etc.) that it ought not to be tampered with.[38]

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[34] *Ibid.* at 78-79.

[35] Rhode shares a similar line of thought when she makes the observation that: "Bar ideology assumes that responsibility for ferreting out false testimony or for insuring 'fair treatment' of unrepresented and inadequately represented opponents rests elsewhere. If an unmeritorious claim prevails, the fault lies with the judge, the jury, or the litigant who failed to secure adequate counsel." Rhode, *supra*, note 12 at 599. As she points out, the problem is that not all individuals have the necessary resources to retain counsel; judges and juries may not always be best situated to determine the parties' needs and interests; and, carefully crafted trial presentation and witness preparation may paint a picture which bears limited resemblance to the actual relational facts which underlie the conflict. *Ibid.* at 600.

This promotion and protection of human dignity justification holds that the core value of the adversarial system is its ability to promote the human dignity of the client.[39] It gives the individual the forum to argue his or her position in good faith until a court determines the outcome. For those who may be "inarticulate, ignorant of the law, shy or simply slow on their feet",[40] the lawyer's role in facilitating the presentation of the case is a vital one. In response, the productive approach suggests that this argument proves the opposite, if it proves anything at all. What it effectively says is that when a person is inarticulate, ignorant, shy or slow on their feet, they should be seen as incapable and in need of assistance. Consequently, the problem is taken out of their incompetent hands and dealt with for them by others.

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[36] *Ibid.* at 594.

[37] Luban, *supra*, Chapter 1 note 23 at 67; and, Rhode, *supra*, note 12 at 605.

[38] Luban, *supra*, Chapter 1 note 23 at 67-68; and, Rhode, *supra*, note 12 at 65.

[39] Luban, *supra*, Chapter 1 note 23 at 85.

[40] *Ibid.*

The high degree of paternalism inherent in this argument is undeniable. If the person's dignity was truly respected, the system would focus on enabling him or her to determine his or her own solutions. If people are inarticulate or shy, they should be provided with an alternative way of expressing themselves. If they are ignorant, they should be given the necessary access to information. If they are slow on their feet, they should be allowed to choose a forum that gives them time to think.

But what of the complexity of the law and the rights it provides? Since everyone can't spend the time it takes to sort out all that the law entails, is the lawyer needed as a navigator? The answer of the productive approach is that legal rights and the possibility of complex procedure will still exist to the extent that they promote productive outcomes. However, this does not mandate a removal of the individual from the conflict resolution process. Individuals do not have to become lawyers to be capable of receiving advice from lawyers and then making their own decisions.[41] Similarly, individuals may need accounting advice, financial planning advice, marketing information, etc. The productive approach doesn't require the individuals to become accountants, bankers or economists either. What the productive approach points out is that the lawyer can either take over the client's life and control the legal decision making, or the lawyer can serve the role of advisor. By providing the client with legal advice, as well as references to other professionals that the client requires to enable her or him to guide the decision making, the lawyer empowers the client to resolve her or his own conflicts productively.[42]

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[41] In the case of a corporate executive who is responsible for resolving multiple disputes each month, the productive approach does not require personal attendance. The corporate lawyers may still represent the company; however, they will be required to proceed within a co-operative and relational paradigm just as the corporate executive would do if present.

What can also be seen about the human dignity argument is its striking circularity. The adversarial system has evolved in such a way that it has come to require highly developed public speaking skills, expert knowledge of the law, and utilizes public forums and procedures that are unaccommodating for the average person, let alone those who are not quick on their feet. Having then made itself unaccessible to the largest number of people the argument seeks to justify the existence of partisan lawyers, which may not even be required if the system had not become inaccessible to the average person in the first place. Rather than respecting human dignity it classifies people into two groups: those who are competent to handle their own problems and those who are not.

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[42] In *Legal Interviewing and Counselling: A Client Centered Approach* the authors discuss referring clients to other professionals for required assistance. In the book the authors are specifically talking about referrals to mental health care professionals but the nature of the advice applies equally well to other professionals. The authors write: "the lawyer will frequently be confronted with a client who seeks assistance with a variety of problems, some of which are only at best tangentially related to the case ... a client ... may desire the lawyer's advice ... about what to do about an entire range of problems which have cropped up since the client [came into conflict] ... the clients' day-to-day living often becomes totally consumed with the endless consideration and reconsideration of their problems. These clients often experience severe stress and have difficulty making decisions, not only about what should be done to resolve the legal dispute, but also about what should be done to resolve a host of day-to-day 'problems in living.' As a result, many clients turn to their lawyers for support and guidance, often because they know of no one else from whom to seek help. Sometimes lawyers can provide the necessary assistance simply by listening in an empathic manner and making a few practical suggestions. However, in some instances lawyers lack both the time and expertise to provide the assistance that would help reduce the client's stress and resolve the various problems. In these instances, it can be to the mutual benefit of both the client and lawyer to refer the client ... [to another] professional." David A. Binder and Susan C. Price, *Legal Interviewing and Counselling: A Client Centered Approach*, (St. Paul: West Publishing, 1977) at 217-18.

A second justification for a partisan adversarial system is referred to by Luban as the social fabric argument. The argument states that:

> "regardless of whether the adversary system is efficacious, it is an integral part of our culture, and that fact by itself justifies it. The first variation [of this argument] is based on democratic theory: it claims that the adversary system is justified because it enjoys the consent of the governed. The second variation is based on conservative theory: it claims that the adversary system is justified because it is a deeply rooted part of our tradition."[43]

Again, one may discern a high degree of circularity in this justification. If another system enjoyed the consent of the governed, would it not be justified and the adversarial system unjustifiable? In a democratic setting nothing can enjoy the consent of the governed unless it is put before them.[44] Attempts to elevate and isolate the authority of the adversarial system do not rely upon the consent of the governed, they avoid that consent by never allowing the question to be asked.[45]

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[43] Luban, *supra*, Chapter 1 note 23 at 87.

[44] In Luban's words: "An immediate problem with the argument, however, is that we do not explicitly consent to the adversary system. Nobody asked us, and I don't suppose anyone intends to, whether or not we accept the adversary system as a mode of adjudication." *Ibid.* at 88.

Similarly, if tradition changed, would the adversarial system remain justified? "[T]he argument from tradition ignores the fact that there is no constant tradition: common law constantly modifies the adversary system."[46] Also, if our traditional view of conflict began to shift to embrace more productive aspects, a system designed to meet the dictates of old traditions would become increasingly less functional. Reliance upon tradition seeks only to justify what has been, it does not consider what could have been or what ought to be. As was discussed previously, when considering the philosophy of John Stuart Mill, there is no reason that custom cannot be, or should not be, looked at in a critical light.

3. The Adapted Prisoner's Dilemma Analogy

If adversary partisanship is not justified, it makes sense to consider other roles for lawyers dealing with conflict. Two alternatives come immediately to mind. The first would be to alter lawyers' obligations within the adversarial system; the second would be to alter or replace the system itself. As stated above, if one desires to create a productive approach to conflict resolution, one cannot do so by focusing on changes within the adversary system alone. Neither changes to the role of lawyers, nor alterations within the adversarial system, will be sufficient. In an effort to understand why this is so, one may draw an analogy between a partisan adversarial system and the philosophical paradox of the Prisoner's Dilemma.

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[45] In Luban's words: "just because people do not have the energy, inclination or courage enough to replace their institutions, we should not conclude that they want them or approve of them. But unless they do want them or approve of them, people's mere endurance of institutions does not make the institutions morally good." *Ibid.*

[46] *Ibid.* at 91.

The adapted prisoner's dilemma may be stated as follows[47]: A family with a mother (M), father (F) and children (C), are contacted by the child welfare agency. There has been a report that the children are in need of protection, a social worker calls at the home and finds the home in deplorable condition. Both M and F are equally responsible for the problems in the home but neither is guilty of child abuse.

The decision is made to apprehend the children no matter what the parents say, at least temporarily until the home can be put into a suitable condition. Interviews are set up with M and F to talk about the future of the family. M and F are to be interviewed separately and they know that they can either co-operate with the child welfare agency and admit their failings as parents, or they can act adversarially, denying any personal failing as a parent and blame the other parent for all of the problems in the home. By blaming the other parent it may create the impression that the situation is worse than it actually is; which, in turn, may result in charges of child abuse being laid.

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[47] A more traditional statement of the prisoner's dilemma would be: Two people are involved in two crimes. Each is aware of what the other has done, both are arrested. One lesser crime, carrying a sentence of 2-5 years, can be proven without either confessing. The greater crime, carrying a sentence of 8 years, can only be proven if one informs on the other. The police separate them and offer a deal: if they inform on the other in relation to the greater crime, they will be given the minimum sentence on the lesser crime. Self-interest is defined as doing as little jail time as possible. Co-operation is defined as working with the other prisoner to receive the lightest sentence. Adversarial behaviour is defined as informing on the other.

The four possible outcomes are: *The 1st and 4th preferable outcomes* - One prisoner co-operates, the other adversarial. The adversarial prisoner gets 2 years in jail, her or his 1st preferable outcome. The co-operator gets a total of 13 years in jail, his or her 4th preferable outcome. *The 2nd preferable outcome* - Both are co-operative. The total sentence for each is 5 years, the 2nd preferable outcome for each prisoner. *The 3rd preferable outcome* - Both are adversarial. The total sentence for each is 10 years, the 3rd preferable outcome for each prisoner.

Although the social worker involved has decided that the children will be apprehended, there are four possible recommendations he or she will make about the parents with regard to access, counselling and possible child abuse charges, depending upon what he or she hears in the interviews with M and F. The four options are:

1) if a parent is believed to be primarily without fault (by admitting no fault and with no blaming by the other parent), then extensive access, no counselling, and no charges will be laid as there is insufficient cause for concern;[48]

2) if a parent is believed to be partly at fault (by each admitting fault and no blaming by the other parent) but is willing to co-operate, with the other parent and with child welfare, then generous access,

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[48] Hereafter, in this chapter and in Chapter Five, this outcome will be simply referred to as the 1st preferable outcome.

family counselling with a view to getting the family back together, and no charges will be laid as cause for concern is being addressed;[49]

3) if a parent is believed to be partly at fault (by no admissions of fault but each blame the other) and is unwilling to co-operate, with the other parent or with child welfare, then restricted access, individual counselling directed at acceptance of responsibility, and no charges will be laid as conflicting evidence from the adversarial parents would not support a charge;[50]

4) if a parent is believed primarily responsible (by admitting fault and by being blamed by the other parent), then no access, individual rehabilitative counselling, and charges will be laid.[51]

The four possible outcomes, based upon the responses of the parents, are set out on the following chart:

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[49] Hereafter, in this chapter and in Chapter Five, this outcome will be simply referred to as the 2nd preferable outcome.

[50] Hereafter, in this chapter and in Chapter Five, this outcome will be simply referred to as the 3rd preferable outcome.

[51] Hereafter, in this chapter and in Chapter Five, this outcome will be simply referred to as the 4th preferable outcome.

M co-operates / F adversarial M = no access, individual counselling, charges (4th preferable outcome); F = extensive access, no counselling, no charges (1st preferable outcome).	M co-operates / F co-operates M = generous access, family counselling, no charges (2nd preferable outcome); F = generous access, family counselling, no charges (2nd preferable outcome).
M adversarial / F adversarial M = restricted access, individual counselling, no charges (3rd preferable outcome); F = restricted access, individual counselling, no charges (3rd preferable outcome).	M adversarial / F co-operates M = extensive access, no counselling, no charges (1st preferable outcome); F = no access, individual counselling, charges (4th preferable outcome).

The dilemma comes when F and M are left to reason on his or her own. Since they are interviewed separately, neither can guaranty what the other will do. If they co-operate they will get either their 2nd or 4th preferable outcome, depending upon how the other acts. If they are adversarial they will get either their 1st or 3rd preferable outcome depending upon how the other acts. The rational choice is to act adversarially, as it involves the best pair of outcomes, and each get their 3rd preferable outcome. They fail to achieve the 2nd preferable outcome that would have been possible if they both co-operated.[52] By making the "rational" choice in isolation, they get the result that neither would rationally choose if she or he could get together and freely pick from the four possible outcomes.

The paradox is alternatively explained as follows: each are operating with a self-interested motive; both are rational; they each know the four possible outcomes; they know they would never agree to the 1/4 outcome in negotiation; of the remaining outcomes the 2nd preferable outcome (the joint co-operation option) would be the rational one to choose; because each may not be able to trust the other the rational (safe) choice they make gets them the 3rd outcome (the joint adversarial option) which is the more irrational choice of the two remaining after the 1/4 options are rejected as a possibility.

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[52] The "1st" and "4th" preferable options are eliminated as rational impossibilities, for two rational agents acting adversarially will not arrive at them and one of the two agents acting co-operatively would never agree to such an arrangement.

Useful parallels may be drawn between the prisoner's dilemma and the adversary system.[53] At the core of both lies the question of how to attain the best results for the individuals involved. The advantage of looking at the question through the prisoner's dilemma analogy is that there are less complications to divert one's attention from that question. Upon either a co-operative or an adversarial core, one may build rigorous rules and safeguards to direct the conflict resolution process. The question that the prisoner's dilemma helps one focus on, is what are the consequences of adopting an adversarial or co-operative model as the core in the prisoner's dilemma; and, by analogy, in a system of justice?

In analysing the Prisoner's Dilemma, one begins to realize that the paradox can only be solved, or perhaps avoided, by a change in the way one thinks about and approaches it. The solution may be to embrace co-operative behaviour as the rational choice, rather than adversarial behaviour.[54] However, a problem arises for co-operation if a person in conflict believes there is any risk that the other may fail to consider the outcomes properly; may make a mistake in his or her thinking; or, if there is any reason for mistrust between the two.[55]

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[53] The prisoner's dilemma and partisan advocacy, of course, vary in their level of complexity and in the number of variables they attempt to deal with. While the prisoner's dilemma is concerned with decision theory in structured examples, the adversary system is concerned with decision theory on a broad range of issues including resolving disputes, protecting rights, promoting principles of fair procedure and similar related concerns.

The obvious answer would be to take actions that insure all outcomes are understood properly, mistakes are kept to a minimum and the risk of harm from a breach of trust is avoided, or will fall upon the betrayer and not the betrayed. While such solutions are beyond the scope of the prisoner's dilemma, they are not beyond the scope of choices that may be made for the evolution of the justice system.

As discussed above, the productive approach strives to ensure that all outcomes are considered properly by focusing on needs and interests and canvassing alternate ways of meeting them. The attempt is made to eliminate mistakes in reasoning by providing the individuals with the information necessary to enable productive decisions. What is not so clear in the productive approach, to this point, is how it may evolve to address the mistrust concern.

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[54] On the rationality of a co-operative solution, see Lawrence H. Davis, "Prisoners, Paradox and Rationality" (1977) 14 *American Philosophical Quarterly* 319.

[55] *Ibid.* at 322.

In productive conflict resolution each person acts within a relationship dynamic. As they canvass the outcomes for settlement they see the possible outcomes of co-operative and adversarial behaviour. One thing the productive approach might do to promote trust is to ensure that no decision is final until both agree to it. If this is done successfully, the chance for betrayal is taken away. A person would then be unable to wait for the other to commit him or herself and then take advantage.

In the adversarial setting, in negotiation, examination for discovery and trial, someone goes first. The person who follows gains the opportunity to take advantage of any behaviour or disclosure which puts the first person at risk. When a trial of the issue concludes the first person may or may not have had the opportunity to recover from her or his vulnerable position. Thus, something is required that would provide the first person with a guarantee that the second person to act must respond co-operatively to a co-operative opening. If such a guarantee could be provided a co-operative approach would give the best result. Somehow, the individuals must be required to act at the same time; or, the dissension resolution must be structured in such a way that the second person faces negative consequences for not responding in kind to the first person's co-operative offerings.[56]

In Duncan MacIntosh's article on the prisoner's dilemma, he summarizes some of the main attempts to justify co-operative solutions to the Prisoner's Dilemma.[57] His analysis is useful for the discussion of productive and destructive conflict resolution as it provides a window into possible avenues that may take the risk out of co-operative behaviour. A brief review of two of the justifications he writes about will serve to illuminate the type of system alternatives the productive approach is suggesting.

One solution MacIntosh relates is the "symmetry solution." The symmetry solution states that:

> "since rational agents will choose the same in same situations, and since it is better for each if both Co-operate than if both Defect, each should Co-operate."[58]

MacIntosh's objection to this assertion is that:

> "while both agents do better if both Co-operate, neither fact gives either an individual reason to do so; for each still does better individually (whatever the other does) if he Defects."[59]

However, MacIntosh's criticism is unconvincing. What his criticism is getting at is the original position where M can choose to co-operate or act adversarially. If M co-operates she will get her 2nd or 4th preferable outcome; if M is adversarial she will get her 1st or 3rd preferable outcome. When the problem is looked at as a problem for individuals, then M "individually" has a combined pair of outcomes which provide a better average result when M acts adversarially.

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[56] Another critic of the co-operative rationality solution to the Prisoner's Dilemma is Duncan MacIntosh. (Duncan MacIntosh, "McClennen's Early Co-operative Solution to the Prisoner's Dilemma" (1991) 29 *The Southern Journal of Philosophy* 341). He believes that once one individual has made his or her choice there is nothing to prevent the second person from acting adversarially. MacIntosh goes one step further to say that, even if the parties initially resolve to co-operate, once the first person has acted the second will find it rational to defect against the first. *Ibid.* at 342. This further demonstrates the point that something must be done to take the risk out of co-operative behaviour if individuals are to be free to access its benefits.

[57] *Ibid.* at 324ff.

[58] *Ibid.* at 343.

[59] *Ibid.*

However, problems of conflict resolution are misunderstood as problems for individuals. Instead, they should be seen as problems of relationship. In the above example, the outcome F and M attain is not solely dependent upon his or her own actions. His or her future is constituted by both individual action and the action of another in the relationship. The people in the prisoner's dilemma are both individual and social beings.[60] Therefore, the proper questions would be, "How can each act to derive the best results from the relationship?", and "What systems are necessary to enable effective decision making within relationship?"

A second solution, discussed by MacIntosh, is the "inducement solution."[61] The inducement solution:

> "involve[s] altering the circumstances of choice so that there are advantages to doing something previously dispreferred. New inducements or penalties are added ... [which] penalizes Defecting, thus making Co-

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[60] This conforms to Nedelsky's discussion of individual, social and relational impact on the actualization of individual goals see Chapter Three, Part 2.

[61] MacIntosh, *supra*, note 56 at 343-44.

operating preferable."[62]

MacIntosh's concern is that the "side-bet" makes the problem no longer a paradox. This may be so, but if one refuses to see problems as anything other than paradoxes there can be never be solutions to them.[63] Productive conflict resolution attempts to transform the nature of the problem so that it can be solved in a way more in keeping with the goals of peace and productivity. New inducements to co-operation need to be developed; and, if penalties for adversarial conduct will reduce or eliminate adversarial behaviour the productive approach would embrace them. What the procedure and philosophy of the productive approach seeks to do is provide a mix of incentives to productive conduct and disincentives to destructive conduct. When the results of productive conduct exceed any benefit that could be attained by destructive conduct, then people will choose to proceed productively.

As Davis has pointed out, choosing co-operation is not a choice against any kind of realistic preference, providing one can be sure the other will be required to respond co-operatively.[64] This is because each know that the 1st and 4th preferred outcome combination will never arise where each is fully informed and a response in kind is guaranteed.[65] In the real world of conflict resolution, each person will know that the 1st and 4th preferable outcomes are not possible, unless one individual can convince a court to impose them on the other; or, unless access to power, information and other resources are distributed unequally and the system makes insufficient allowance for this fact. No one will willingly agree to take the 4th preferable outcome and concede the 1st preferable outcome to the other providing they have all of the information and are enabled to do otherwise. If the justice system considers individuals to be equal, one should stop to ask why rules and procedures have been set up that effectively impose the 1st/4th preferable outcome combination on individuals. To answer by suggesting the 1st/4th preferable outcome combination is dictated by particular rights, truth, facts, reason and justice, ignores the relational nature of these concepts;[66] and, it assumes they are to be found on one side of the conflict which is rarely the case.

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[62] *Ibid.*

[63] By their nature paradoxes are unsolvable. In MacIntosh's work he is attempting to explain how the paradox arises in situations of decision making under uncertainty. If the example is changed so that there is no uncertainty in the decisions to be made then the paradox is averted. MacIntosh is correct in his concern that this does not answer the paradox it merely alters and avoids it. However, in the adversarial system the decisions to be made under uncertainty are artificial constructs. The uncertainty is conditional upon the mechanisms that have been adopted for dispute resolution within the adversarial model. It is possible to adopt other mechanisms that avoid the uncertainty and thereby eliminate the paradox in the adversarial system in a way that may not be possible under the prisoner's dilemma.

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[64] Davis, *supra*, note 54 at 322.

[65] *Ibid.* at 324-25.

[66] As discussed in Chapter Three, Parts 6-8.

4. Getting Unstuck, Options for Evolution

In order to proceed with evolution which will take one beyond the adversarial system one should bring back to mind the fact that the way we resolve dissension is a matter of choice, not fate. Those who support the goals of peace and productivity, yet make recommendations for change directed solely within the adversarial system, are fighting a losing battle. Take Luban, for example, who states:

> "first, the adversary system, despite its imperfections, irrationalities, loop-holes, and perversities seems to do as good a job as any at finding truth and protecting legal rights. None of its existing rivals ... are demonstrably better, and some ... are demonstrably worse. Indeed, even if one of the other systems were slightly better, the human costs - in terms of effort, confusion, anxiety, disorientation, inadvertent miscarriages of justice due to improper understanding, retraining, resentment, loss of tradition, you name it - would outweigh reasons for replacing the existing system. Second, some adjudicatory system is necessary. Third, it's the way we have always done things."[67]

The assumption that we are stuck with the adversarial system is, however, a false dilemma. We are only stuck if we are unwilling to consider evolutionary possibilities which lay beyond the adversarial system.[68] The productive approach

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[67] Luban, *supra*, Chapter 1 note 23 at 92.

[68] An example of this stuck thinking is demonstrated by Maurice Rosenberg, who writes: "Once a legal dispute ripens beyond the stages of grievance and complaint, there are two basic ways to resolve it: an imposed solution or an agreed solution; that is, by a decision or a settlement. A settlement obviously can be reached by themselves, with no one else involved. On the other hand, an imposed decision always requires a third party. However, it is not the presence or absence of the third party that is the critical factor in the dynamics of dispute resolution. It is the involvement of the third party as decision-maker that spells the difference." Maurice Rosenberg, "Resolving Disputes Differently: Adieu to Adversary Justice?" (1988) 21 *Creighton Law Review* 801 at 801.

However, this passage contains a clear false dilemma. It is untrue that a settlement can obviously be reached by the disputants themselves without is such a possibility. The evolutionary background for it, the mind-set and theoretical basis to support it and the concerns it must meet in the face of an adversarial setting have all been addressed. It remains to discuss some of the procedural options that may be utilized to realize it. This will be the focus of Chapter Five.

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outside help. Sometimes it is the injection of a third party which makes the crucial difference in whether the parties settle or not. By providing expertise, objectivity, information, safety, or numerous other things, the third party may enable the disputants to solve their conflict. The third party's capacity as a decision maker may be totally unnecessary and thus make no difference at all.

Chapter Five:

Evolving a Peaceful and Productive Conflict Resolution System Through Alternate Paths

1. Enhancing the Skills of Negotiation

Webster's New Collegiate Dictionary defines the verb to "negotiate" as:

> "to confer with another so as to arrive at the settlement of some matter ... to deal with (some matter or affair that requires ability for its successful handling) ... to arrange for or bring about through conference, discussion, and compromise"[1]

The productive approach emphasizes this sense of negotiation. Productive conflict resolution uses negotiation as a skill that can be applied in multiple settings. This skill involves adherence to the principles enunciated in preceding chapters; and, depends upon the practical systemic issues to be discussed in this chapter.

Of the current forms of dissension resolution, e.g., mediation, arbitration and litigation, mediation is the one that most closely conforms to the requirements of productive conflict resolution. Mediation practitioners try to encourage people to develop and utilize negotiation skills that enable them to solve their own disputes. Mediation practitioners also direct people's attention toward a discussion of their needs and interests. While this chapter is not directly about mediation, mediation will serve as a practical example for discussion of productive negotiation skills and systems. Criticisms of mediation provide helpful insights into problems that the productive approach must overcome if the goals of peace and productivity are to be attained in practice as well as theory.

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[1] Webster's New Collegiate Dictionary (Toronto: Thomas Allen & Son Limited, 1979) at 762.

The dynamics of negotiation involve skills and systems for dealing with dissension. To understand this better one may turn for assistance to the work of Roger Fisher and William Ury, *Getting to Yes.*[2] Fisher and Ury indicate that, generally, when people think of entering negotiation they visualize it as an exercise in positional bargaining.[3] The problem is that:

> "When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so."[4]

This can lead to a hard approach to negotiation which can produce unwise and inefficient agreements and damage ongoing relationships.[5]

The hard negotiator "sees any situation as a contest of wills in which the side that takes the more extreme positions and holds out longer fares better."[6] This is the position taken by a dominant person or by a person who has an adversarial approach to conflict. The hard negotiator wants to win.[7] He or she associates winning with losing; therefore, a victory on one person's part necessarily implies a corresponding loss on the other person's part.

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[2] Roger Fisher and William Ury, *Getting to Yes* (New York: Penguin Books, 1981).

[3] *Ibid.* at 3-4.

[4] *Ibid.* at 5.

[5] *Ibid.* at 5-8.

"Many people recognize the high costs of hard positional bargaining ... [t]hey hope to avoid them by following a more gentle style of negotiation."[8] This is the approach of the "soft" negotiator. The soft negotiator "wants to avoid personal conflict and so makes concessions readily in order to reach agreement."[9] As such, the soft negotiator capitulates, giving in to the wishes of the dominator.

Despite their surface differences, there is a common element in both of the soft and the hard approaches; i.e. they both reflect a destructive view of conflict. In the hard approach one will win, the other will lose, the effort to seek mutual growth is not made. In the soft approach the need to avoid conflict, to be done with it, takes precedence over using it as an opportunity for growth. Conflict is seen as something to be avoided in both approaches, only the methods change.

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[6] *Ibid.* at xii.

[7] In Fisher and Ury's words, a consequence of this approach to conflict is that the hard negotiator "often ends up producing and equally hard response which exhausts him and his resources and harms his relationship with the other side." *Ibid.*

[8] *Ibid.* at 8.

[9] *Ibid.* at xii.

Fisher and Ury identify a third way to negotiate which they have termed "principled negotiation".[10] In principled negotiation the idea is to decide each conflict on its merits (i.e. based upon underlying needs and interests) rather than through a haggling process where each person forms positions on what they will or will not do. Principled negotiation looks for mutual gains. Where interests appear to be mutually exclusive, it tries to identify aspects of the relationship that prevent the need to assess which individual interest is the better one.[11] In this fashion, principled negotiation seeks to transform conflict into an opportunity for growth for each person involved in the dissension.

Productive negotiation picks up where principled negotiation leaves off. An effort is made to evolve beyond the principled approach to negotiation, set in an adversarial milieu, to a productive approach to negotiation set in a co-operative framework. The productive approach makes a distinction between capitulation and co-operation. For co-operation to exist there must be meaningful contributions from all people involved, and a willingness to decide conflict through consensus[12] rather than through capitulation.[13]

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[10] *Ibid.* The discussion of principled negotiation which immediately follows draws heavily from the writing of Fisher and Ury at page xii.

[11] That is, it does not attempt to say that an individual's particular interest is unworthy of respect; nor, does it attempt to place the interests of each individual against one anther to determine which interests are more valuable. Instead, it looks to all of the interests in their relationship context and tries to develop principles that will shape the relationship in the manner that will best accommodate those interests. The person is not required to modify his or her interests because the interests of the other person are determined to be more valuable. To the extent that an individual must modify his or her interests he or she does so because the principled relationship is seen to be more valuable than the unaltered interest.

With capitulation, the person draws no bottom lines beyond which he or she will not settle. However, if no bottom lines are drawn by a passive or subservient person, they may end up being taken advantage of. One may be required to draw a bottom line or stand by and watch their needs and interests be sacrificed.

Within a productive approach the necessity of bottom lines is acknowledged but people are directed to draw their bottom lines in compliance with the principle of fallibility. People must make decisions if they want to grow. Within a productive negotiation setting, what is urged is that the decisions taken should not constitute a positional bottom line; nor, should they be drawn so as to decide the question for others or place the decision forever beyond questioning.

Within productive negotiation it is recognized that some people are more wilful, assertive or aggressive than others. Strength of will or strength of purpose may provide individuals with much needed incentive to continue with their claims. Rather than bypassing the wilful element, the productive conflict resolution system is designed to channel it into productive outlets and balance it with the other factors that come to bear in productive conflict resolution. For those who would be disadvantaged in a struggle of wills, the productive approach is designed to equalize people by providing access to resources previously lacked; and by adopting the forum of conflict resolution so that it meshes with the individual's needs.

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[12] Consensus may be defined as "general agreement ... the judgment arrived at by most of those concerned", Webster's, *supra*, note 1 at 238-39; or, as a settlement reached where there is not agreement on all issues but the outstanding issues are such that those involved in the settlement are prepared to live with the differences.

[13] Capitulation may be defined as "to surrender ... to cease resisting". *Ibid.* at 163.

But, can you force someone to be co-operative? Basically, a process that assumes good faith in bargaining will strive to facilitate and reward those who proceed in good faith and disadvantage those who do not. If a person continues to think and act adversarially, atomistically or combatively, then mechanisms embedded within the productive approach would impose negative consequences at a level sufficient to make the payoff for combative action less than the payoff for co-operative behaviour. This follows a belief that people change when they see that what they are doing is no longer working. If consequences for combative behaviour are made less attractive and the rewards for co-operative behaviour more attractive, then the person will change accordingly.

The exact mechanisms that could be employed to shift the balance between adversarial and co-operative consequences are a topic for future discussion. They could take the form of procedural incentives or disincentives, for example shifted financial costs. They could be substantive incentives or disincentives, for example some form of default judgment, or default assumptions, which reward the co-operator with her or his 1st preferable outcome and leaves the combative individual with his or her 4th preferable outcome.[14] The exact nature of these incentives and disincentives is not critical at this point. They will be many and varied depending upon the needs and interests to be addressed and the parties involved. Some general rules and guidelines can be established but flexibility must be retained. The important concept is the desire to look for these incentives and disincentives and to test them based upon their instrumental value in promoting peaceable and productive outcomes.

2. How the Retention of an Adversarial Backdrop Taints Productive Evolution

In conducting productive negotiation within an adversarial backdrop, the parties know that, should the settlement efforts fail, they must ultimately prepare for adversarial litigation. Even if one of the individuals wishes to take a co-operative approach, disclosing all of his or her needs and interests, he or she cannot. For, once the co-operative effort is made, the co-operator is laid open to an adversarial response which will give the 1st preferable option to the adversarial opponent and leave the 4th preferable option for the would be co-operator.

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[14] Here "1st" & "4th preferable outcome" refer back to the prisoners dilemma analogy. The are intended to reflect the idea that the co-operator should be rewarded with something approximating his or her most preferable option. The adversarial individual should be left with something approximating her or his least preferable option.

Even though "without prejudice" negotiations are recognised in the adversarial system, this is not a sufficient protection for the would be co-operator.[15] In order for a communication to be protected, under the "without prejudice" principle, it must contain an offer of settlement. A disclosure of the needs and interests may further productive conflict resolution, but if the disclosure was not carefully embedded within a proposal for settlement, they would not be protected. Even if the "without prejudice" rule is applied, disclosure may contain information that can be verified through an independent source or it may provide the basis for a cross-examination.

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[15] John Sopinka, Sidney N. Lederman and Allan W. Bryant (in their book *The Law of Evidence in Canada* (Toronto: Butterworths, 1992)) explain the without prejudice privilege as follows: "It has long been recognized as a policy worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without a resort to trial. In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement was forthcoming." *Ibid.* at 719.

The authors go on to explain that, there are a number of conditions that must be present for the privilege to be recognized: (a) a litigious dispute must be in existence or within contemplation; (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations fail; and (c) the purpose of the communication must be to effect a settlement." *Ibid.* at 722.

It may also give one's opponent an insight into how strongly one feels about the case, e.g. how far one is prepared to go; the opponent could adjust his or her litigation strategy accordingly. In any of these instances the would be co-operator may risk harm to his or her case by being too open.

Accordingly, in an adversarial setting, the parties may tend to hold back information useful to productive resolution of the conflict because of the fear that they will be harmed by the prior full disclosure at any subsequent trial. Thus, with an adversarial backdrop the disadvantage lies in disclosure; with a productive backdrop the risk lies in failure to disclose. For productive conflict resolution to work, the current legal problem solvers must change their mind set.[16] What the productive approach consists of is not simply an alternative method of dispute resolution based within an adversarial setting. Productive principles are not meant solely for use by individuals prior to going to court. They are also meant for application by adjudicative bodies.

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[16] As Carrie Menkel-Meadow writes: "Lawyers may use ADR not for the accomplishment of a 'better' result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage. Legal challenges cause ADR 'issues' to be decided by courts. An important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment may be counterproductive to the transformations proponents of ADR would like to see in our disputing practices." Carrie Menkel-Meadow, "Pursuing Settlement in and Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR'" (1991) 19 *Florida State University Law Review* 1 at 3. For a further discussion on this point see Menkel-Meadow Coopted at 16-17. And at 32-33 she writes: "The use of settlement activity in the courts should be understood as the clash of two cultures. To the extent that settlement activity seeks to promote consensual agreement through the analysis of the point of view of the other side, it requires some different skills and a very different mind-set from what litigators usually employ. Thus, the issue is whether judges and lawyers in the courts can learn to reorient their cultures and behaviours when trying to settle cases or whether those seeking settlement continue to do so from and adversarial perspective." *Ibid.* at 32-33.

3. Responding to Possible Problems With a Mandatory Productive Approach

3.1 The Distributional Bargaining Problem

One possible criticism of the productive approach is that it is in some way naive because it fails to deal with the distributional bargaining problem. The distributional bargaining problem is where there is dissension surrounding the allocation of fixed resources; thus, the circumstances are such that a gain by one individual results in a corresponding loss to the other. This is White's criticism of the way Fisher and Ury deal, or fail to deal, with the distributional bargaining problem in *Getting to Yes*. White writes:

> "Unfortunately the book's emphasis upon mutually profitable adjustment, on the 'problem solving' aspect of bargaining, is also the book's weakness. It is a weakness because emphasis of this aspect of bargaining is done to almost total exclusion of the other aspect of bargaining, 'distributional bargaining,' where one for me is minus one for you."[17]

It seems that if White's criticism of *Getting to Yes* is valid, then it would also be an effective criticism of the productive approach.

To demonstrate his criticism, White gives an example of a labour negotiation where the parties are able to agree on a different medical plan that is less costly to the employer and provides enhanced benefits to the employees. However, the negotiation becomes stalled on wage increases in which every dollar paid for wages will be a corresponding dollar lost to the employer and the shareholders. In White's view, "One can concede the authors' [Fisher's and Ury's] thesis ... yet still maintain that the most demanding aspect of nearly every negotiation is the distributional one in which one seeks more at the expense of the other."[18]

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[17] James White, "The Pros and Cons of 'Getting to Yes'" (1984) 34 *Journal of Legal Education* 115 at 116.

But White's understanding of the principles in *Getting to Yes* appears to be incomplete. White states:

> "[Fisher and Ury] seem to assume that a clever negotiator can make any negotiation into problem solving and thus completely avoid the difficult distribution ... To my mind this is naive. By so distorting reality, they detract from their powerful and central thesis."[19]

However, the ability to deal with distributive bargaining is a strength of *Getting to Yes* and the productive approach when they are understood and applied properly.

In a case where mutual advantage is easily discovered almost any system will be able to resolve the dissension. In the case of distributional bargaining, advocates of the productive approach give the parties the information required to show where the limits are. The needs and interests that underlie the conflict are then explored and alternative strategies uncovered. Such an approach thereby enables people to break the distributive impasse, rather than encouraging them to bully their way through with the use (abuse) of objective power. Where the impasse cannot be broken or is beyond the ability of parties to discover alternate ways to act, then the productive approach is still preferable as it does not privilege one person at the total expense of the other.

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[18] *Ibid.* at 116.

[19] *Ibid.*

In the medical coverage portion of White's example the parties were able to tailor an agreement that met the company's interest in saving money and the employee's needs in having adequate medical coverage. What White overlooks is the fact that if the company's only need or interest was saving money, they may not have a medical plan at all; and, what the employees feel to be an adequate medical plan can only be determined once their needs and interests in having one are examined. White's example takes the medical plan as a given and then the modification of the plan as a simple matter because it is seen to benefit both. However, somewhere along the line the needs and interests of the parties had to be assessed to get the original medical plan.

In the wage increase portion of the example, White assumes a deadlock because, for him, wages are the bottom line interest. But is this really the case? The skill in productive negotiation is to take these apparent deadlocks, analyse them for basic underlying interests and thereby create room to negotiate where initially none appeared to exist. One could ask the employees why they wish to have a higher wage: are the cost of groceries too high; do they want better cars; do they want more accessible vacations; do they want extra money to pay tuition for further education, etc? Rather than providing a wage increase the employer may arrange to buy groceries in bulk, arrange a group buying discount at a car dealership, charter lower cost vacation flights, etc. If the savings to be realized by the employees are significant, they may decide to drop the wage claim, work one day a year without pay, or even accept a wage roll back. None of these possibilities will ever be canvassed as long as the negotiation stays bogged down in the "one for me, minus one for you" mentality. The power to "create" options where none existed is the strength of the productive negotiator.

To the extent that the problems posed by White are difficult to solve, it is at least partly because of the issue based focus he employs. As was discussed in Chapter Two, the way we solve conflict is a matter of choice. We do not have to continue to approach conflict in the traditional way. Once again, the idea of productive negotiation is to create some flexibility where none appears to initially exist. White assumes the either/or conundrum to be unavoidable and then proceeds with his criticism. However if the assumption is flawed the criticisms will be flawed as well. In fairness to White, there will be cases where other options cannot be found. But, as Fisher has written, in reply to White's criticisms:

> "The world is a rough place. It is also a place where, taken collectively, we are incompetent at resolving our differences in ways that efficiently and amicably serve our mutual interests ... The guts of the negotiation problem, in my view, is not who gets the last dollar, but what is the best process for resolving that issue. It is certainly a mistake to assume that the only process available for resolving distributional questions is hard bargaining over positions. In my judgment it is also a mistake to assume that such hard bargaining is the best process for resolving differences efficiently and in the long-term interest of either side."[20]

3.2 Minimizing the Threat of a New Process

Mandatory mediation has been criticised as being destructive to people "because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be."[21] But this is an inaccurate criticism and has even less application to the productive model. The productive model seeks to give people input into the structure they are involved in. Unlike adversarial court proceedings, with a productive approach the attempt is made to modify the shape of the proceedings to suit the needs and interests of the parties. The process chosen may involve few rules and require minimal contribution from individuals other than the parties in conflict; or, there may be extensive procedural safeguards and outside assistance involved. The key is that all choices be built upon a productive core. The intention is not to force people to "be" any one way, the aim is to give people the subjective power to be what they desire as it is consistent with their relational context.

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[20] Roger Fisher, "Comment by Roger Fisher" (1984) 34 *Journal of Legal Education* 120 at 120.

[21] Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *The Yale Law Journal* 1545 at 1549-50.

Another concern is expressed by Grillo when she states that people involved in a divorce, for example, experience what seems to be a threat to their very survival. She writes:

> "Against this backdrop, mediation must be seen as a relatively high-risk process. To begin with, for most people it is a new setting. Its norms are generally not understood by the parties in advance, with the result that the parties are extremely sensitive to cues as to how they are supposed to act; they will look to the mediator to provide these cues ... informal sanctions applied by a mediator can be especially powerful, quite apart from whatever the actual authority he [or, presumably, she] may have."[22]

The fact of the example is that the divorcing couple's survival is threatened. Their lives will not continue to be as they have been. Finances, child care, property ownership, companionship, social life, employment choices, etc. are all threatened. The process chosen to deal with this upheaval cannot change the fact that it exists.

What Grillo does not acknowledge is that an adversarial setting will also be new for most people. Its norms will not be understood; and, further, little effort will be made to make them understood. Within the productive approach efforts will be made to explain what is going on in a way that enables the parties to understand and influence the process.

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[22] *Ibid.* at 1556.

As well, a productive approach has the benefit of being an extension of how people resolve conflict in their daily lives. When people have minor disagreements they do not proceed to resolve them by issuing statements of claim, statements of defense and adhering to strict rules of evidence. Instead they begin to negotiate, some from a position-based approach, some from an interest-based approach. Thus, contrary to Grillo's suggestion, the productive approach is not a totally new setting. If the people's conflict resolution skills or resources fail them, it makes more sense to enhance their skills and resources rather than shift them into the unfamiliar world of adversarial litigation. Once in the adversarial world, any skills they pick up will be of little use to them when they return to their everyday lives. On the other hand, if the people's negotiation skills and resources are enhanced they may begin to resolve more conflicts on their own in the future.

As for the type of process to be chosen, anything in this situation is a high risk process. Whenever a marriage, intimate relationship or even a long standing business arrangement breaks up, the possibility for pain and danger exist. As much as one might like to avoid, it is not possible to do so. A process that protects without empowering only delays the pain and danger and it leaves behind a person who is still vulnerable to what others may do to her or him in the future.

According to Grillo, the mandatory nature of mediation exacerbates the danger to the individuals involved in threatening situations. Grillo believes:

> "the notion that the parties are actually making their own decision is purely illusory. First, the parties have not chosen or timed the process according to their ability to handle it. Second, they are not allowed to decide themselves how much their lawyers should participate, but instead are deprived of whatever protection their lawyers have to offer. Finally, they are not permitted to choose the mediator, and they often cannot leave without endangering their legal position even if they believe the mediator is biased against them."[23]

Here Grillo is mistaken both in what she says and in what she implies. The parties are not making their own decision about entering productive conflict resolution but that decision has little negative impact. They are in conflict whether they wish it or not. In a productive setting, they can still decide on the process to be followed and the agreements they will or will not consent to. The situation is much different in the adversarial system where they can not choose to enter it, i.e. they must respond to the claims of the other or lose by default; and, they can not shape the process or reject the outcome.

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[23] *Ibid.* at 1581-82.

Grillo does acknowledge the double bind created when mediation is not mandatory. She writes:

> "if opting out of mediation is permitted, some women (as well as some men) will be forced to litigate when their preference would have been to mediate. There is no way around this unfortunate situation. Either some women will be forced to litigate against their will, or some will be forced to mediate against their will."[24]

If people are to be forced into one process or another, then it makes sense to force them into the process that is most conducive to peace and productivity (if indeed those are our goals) and which holds their needs, interests and growth as the core of what is being sought.

With regard to lawyer participation, the parties can receive as much advice from their lawyers as they desire and can afford. The lawyers can even participate in the productive conflict resolution as long as their efforts are directed to productive ends and they avoid conduct which seeks to turn the productive process into another adversarial tool. The lawyers can still research precedent for those in conflict to obtain guidance from what was done in the past and to help the parties generate solutions for the present and future.

As for impartial fact finding, the parties may be able to lessen their individual costs by jointly obtaining the services of an expert with the skills necessary to uncover the needed information. If one person was unsatisfied with the result; if one person was uncooperative in providing the required information; or, if the parties' versions of the facts remained irreconcilable, then the adjudicative portions of the productive approach would remain available. Judges and courts would still have a role to play, they would just play it with a different end in view.

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[24] *Ibid.* at 1583.

As for the role of procedural fairness, known procedures would still exist. Saying that the procedures must be flexible does not eliminate the need for all structure. The question to be asked in establishing procedure is whether the rule is productive for growth in general and in the particular circumstance. Violence would not be tolerated in any circumstance, for example, while formal disclosure of documents may be necessary in some cases and not others.

3.3 The Problem of Injustice Through Lack of Consistency and Lack of Guiding Precedent

A criticism of placing too much emphasis on settlement is set out by Owen M. Fiss.[25] In Fiss' words:

> "The dispute-resolution story makes settlement appear as a perfect substitute for judgment ... settlement appears to achieve exactly the same purpose as judgment - peace between the parties - but at considerably less expense to society ... however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs ...

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[25] Owen M. Fiss, "Against Settlement" (1984) 93 *The Yale Law Journal* 1073.

> public officials chosen by a process in which the public participates. These officials ... possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."[26]

To respond to Fiss' public resources argument first, why shouldn't the government strive to further the ends of private parties? If all individuals are considered equal, steps should be taken to help them grow even if they do not choose the path of the majority; providing, of course, that the paths they do select are not destructive and harmful to others.[27] When focus on individuals and individual relationships is lost, and the amorphous will of the majority takes over, justice is as likely to slip away as it is to be realized in cases which fall outside the norm.

On the idea of precedent creation, Goldberg and his co-authors point out that there is a difference between novel cases that require a definitive precedent (and hence, in their view, a court decision), and those cases which require recurring applications of prior precedent (and thus can be handled by a less sophisticated dissension resolution mechanism).[28] In response, there is no reason a productive conflict resolution system would be incapable of providing precedent. A decision does not have to be made in a particular forum for it to provide guidance. What is required is that the decision or settlement be accessible for future reference. For example, registration could be required for those serving as mediators in a productive system. Then, all registered mediators could be required to provide summaries of the settlements they were involved in. These summaries could be non-identifying or they could name the parties. This would depend upon whether the substance of the dispute or the parties to the dispute, or both, are of productive and precedent making concern to the greater community.[29]

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[26] *Ibid.* at 1085.

[27] On this point one may refer back to Chapter Three.

[28] Stephen B. Goldberg, Eric D. Green & Frank E. A. Sander, *Dispute Resolution* (Boston: Little, Brown and Company, 1985) at 10.

It must be recognized that a dissension resolution system performs two functions. Providing precedents for society is only one function. The other, and often neglected function, is resolving conflict for the parties involved. If all dissension could be resolved productively without recourse to precedents, then the call for the development of precedent would be moot. On the other hand, if the parties have no recourse to any general rules they may end up lacking the information they need to meaningfully resolve their conflict. There is an interplay between both functions. Unfortunately, the call for an adversarial system to ensure the development of precedent may be to the exclusion of requirements for more peaceful and productive conflict resolution.

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[29] In situations where one party to the dissension wants the matter kept private and the other wants it made public the nature of the report would have to be decided on a case by case basis. The mediator, through reference to an adjudicatory body, could refer to the needs and interests that would be met by providing or avoiding named disclosure. For example, consider a case where a woman wishes remedy for having been sexually abused while she was a child. She is hesitant to proceed in an open forum but the alleged abuser wants to make it public and more difficult for her. Compare this to a case where a faulty product has injured an individual. The individual wants it public to protect others but the manufacturer wants it kept private.

Fiss would certainly not agree with this conclusion. For him, advocates of alternative dispute resolution are mistaken by assuming rough equality between the contending parties.[30] This is not the case, especially in productive conflict resolution. Productive conflict resolution is structured with the distinct possibility that the people will not be equal; but, as this facet has been discussed in numerous instances above, it will not be pursued again at this point. If anything, Fiss' criticism applies more to the adversarial system than it does to ADR (alternative dispute resolution) or the productive approach.[31]

Most of the criticisms that Fiss levies similarly apply more to the adversarial system than they do to ADR or the productive approach; however, somehow he attempts to lay them on the ADR doorstep. For example, he states:

> "In truth, however, settlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently

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[30] Fiss, *supra*, note 25 at 1076.

[31] For a comprehensive discussion on the failings of the adversarial system in insuring equality, see Rhode, *supra*, Chapter 4 note 12.

distributed unequally."[32]

But if a settlement can be coerced because the litigation expenses will be too high to proceed, clearly this is a problem of the adversarial process, not the settlement.

In a similar vein, Fiss goes on to say:

> "the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation ... he may need the damages immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less no than he might if he awaited judgment ... the poorer party might be forced to settle because he does not have the resources to finance litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery."[33]

How Fiss can claim these are problems of settlement is difficult to understand.

One valuable contribution Fiss does make is his concern that imbalances of power can distort the result. He writes:

> "imbalances of power can distort judgment as well: Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory. We count, however, on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities."[34]

It should be observed that the imbalances of power he is speaking about are located in the adversarial system, not a high recommendation for its acceptance. He seems content to pin his hopes on the judge's ability to discover the truth and do justice in the case despite the odds against her or him. Given the discussion of truth, rights and related concepts in Chapter Four, this hope may not be as well based as Fiss believes.

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[32] Fiss, *supra*, note 25 at 1076.

[33] *Ibid*.

[34] *Ibid*. at 1077.

Nonetheless, Fiss' concern about power imbalances cannot be dismissed out of hand. He states:

> "The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal."[35]

If the productive approach did not address power imbalances it would be a fatal flaw. In such a case the directing influence of an independent court would be of significant advantage. But one should recall the discussions of power dynamics in Chapter Two. As discussed there, the productive approach seeks to derive its decisions through relational power and secondarily through subjective power; objective power is not considered to be an appropriate dynamic for productive conflict resolution. Also, if one is concerned that private resolution of disputes will somehow leave the more powerful or persuasive individual free reign to work his or her will, one should recall the discussions in Chapter Three relating to: relational autonomy; the tripartite aspects of truth, facts and reason; the relational focus of rights and justice; the inclusion of a Raz-like perfectionism which prevents the access to destructive options, and the "workable paradox" which effectively increases the "public" aspect at the same time as enabling "private" decision making.

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[35] *Ibid.* at 1085-86.

However, caution when altering the role of the courts to a more productive model is nonetheless a sensible idea. Menkel-Meadow writes:

> "having adjudicators engage in too much mediative conduct may compromise the ability of judges to engage in both fact-finding and rulemaking. If courts fail to provide sufficient baselines in their judgments, we will have difficulties determining if particular settlements are wise or truly consensual."[36]

Her assertion has appeal. However, if adjudicators utilize mediative conduct what they will be telling disputants is that mediative conduct is expected when dealing with disputes. If the courts find facts from a relational standpoint and make rules for a productive mode of conflict resolution, they are still be developing precedents. The difference is that the precedents will be more consistent with the goals of peace and productivity. The change in focus of the precedents does not eliminate rights or due procedure. Instead, it merely evolves those rights and procedures into ones which will work more productively.

But, some may ask, what of the related idea of justice requiring consistency, i.e. that like cases should be treated alike? For example, one may ask where is the justice in the system if one person hit by a car has simple needs and interests and claims little; whereas another person is very demanding and gets more? Is there to be no appeal to objective assessments?

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[36] Menkel-Meadow, *supra*, note 16 at 33.

What must be recalled is that, in the productive approach, needs and interest are based upon a relational dynamic which includes subjective, objective and relational factors. As such, appeal to objective factors is not eliminated; rather, it is merely combined with other relevant concerns. It will still be important to know what factors drove the person with lower expectations to settle for a lower amount. If the individual had less subjective power with which to articulate her or his needs and interests; if he or she lacked important information; if she or he did not understand the process; then, in any of these cases, it could be said that the productive approach was not fulfilling its mandate. If these, or similar problems were not present, and the person with lower expectations was truly satisfied with the result, one could reasonably conclude justice was done.

Rather than protecting the downtrodden, which is a laudable aim embraced within a productive approach, Fiss, in his final analysis, seems more concerned with protecting the adversarial system. He states:

> "I am willing to assume that no other country ... has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame. What is unique is not the problem, that we live short of our ideals, but that we alone among the nations of the world seem willing to do something about it. Adjudication American style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment."[37]

3.4 Problems of Power Imbalances and Abusive Relationships

A serious criticism of alternative dispute resolution, as it currently exists, is that it does not effectively empower women, minorities or other oppressed groups. The criticism asserts that, in fact, alternative dispute resolution may even serve as a further mechanism of oppression in cases where individuals and groups are beginning to assert their rights in court.[38] But, is this the case, and will it be the case for the productive approach?

In the words of Goldberg et. al.:

> "Where one disputant has significantly less bargaining strength than the other (e.g. a habitually deferential or financially naive wife dealing with her experienced businessman husband ...), an adjudicatory forum in which principle not power will determine the outcome may be preferable. In some situations, the mere availability of adjudication provides important leverage for bringing the more powerful party to the

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[37] Fiss, *supra*, note 25 at 1089-90.

[38] This criticism of ADR is fully set out in the work of Grillo, *supra*, note 21.

> bargaining table and reducing inequalities of bargaining power."[39]

The productive approach is in total agreement with the assertion that differential bargaining power is a serious concern that must be addressed. However, the conclusion of Goldberg et. al., that an adjudicatory model is required to address this concern, may be a hasty conclusion. This is especially so if "adjudicatory model" is interpreted as being synonymous with an adversarial adjudication model.

First of all, the productive approach is not without adjudicatory forums. Secondly, there is nothing that prevents a non-adjudicatory forum from proceeding on strict principles. Principles can be defined and enforced in a mediation process, for example, which ensure that each party complies with the requirements and guidelines of mediation.

The problem with a "power over" relationship is that the stronger person's needs and interests are fulfilled without consideration of the weaker person's needs and interests. The weaker person remains disempowered and her or his needs, if met at all, are only met indirectly. Putting the disputants into an adjudicatory forum allows the weaker person's interests to be expressed - assuming that the weaker person can find and hire a lawyer with skills comparable to those of the lawyer hired by the more powerful person - but it still does not enable the weaker person. In the example of Goldberg et. al., the deferential and dependent wife simply becomes dependent upon her lawyer. She may come out of the court proceedings with more assets but no further skills to resolve conflicts with her ex-husband in the future.

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[39] Goldberg, *supra*, note 28 at 11.

When a disempowered wife goes into mediation she does not have to be alone. The advantage of the adversarial system, as Goldberg et. al. would have it, is that others become involved who can correct the power imbalance, e.g. lawyers and judges. There is no reason those involved in the productive system, e.g. the mediator, lawyer or adjudicator, cannot take steps to balance the power of the two parties.

What is important is that the system, whichever it may be, clearly indicate that destructive behaviour is not acceptable. If the disincentives which back up this indication are sufficient, then there will be no net gain for those who would seek to use objective power over another. But there is one cautionary note that is critical to observe here. In the words of Gagnon, "A process to address mediator bias becomes crucial if the mediator is making recommendations to the court."[40] Mechanisms need to be developed that ensure mediators do not work in isolation. They need the advantage of peer review of their perceptions and their conduct and conclusions must be subject to review by other official bodies. The productive approach would seek to meet these needs.

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[40] Andree G. Gagnon, "Ending Mandatory Divorce Mediation for Battered Women" (1992) 15 *Harvard Women's Law Journal* 272 at 287.

A productive approach doesn't seek to balance power by adding objective power to the weaker side. Such an approach only results in fighting "power over" with more "power over". Instead, a productive approach aims at increasing the weaker individual's subjective power and ensuring that conflicts are dealt with in a relational power context. To the extent that objective power is used by the system it is done to ensure that an individual who refuses to act productively will incur the negative consequences for the behaviour rather than passing them off on the other individual. If objective power is undesirable, nothing is gained in the quest for peaceable and productive outcomes by providing a champion who will enter into a combative scheme which pits objective power against objective power. All this does is make the conduct of each side equally undesirable.

Where the issue of power imbalance is perhaps most predominant, and most difficult to deal with, may be in cases of domestic violence. One may ask whether the productive approach could meaningfully operate within a battering relationship. It has been said that:

> "It seems absurd to require a crime victim to negotiate an agreement with the criminal perpetrator about ...

the most important issues of the victim's life".[41] Advocates of a productive approach agree that battering is not something to be mediated, it is a crime. However, the victim in these situations will still have other concerns, beyond the battering, which she or he needs resolved. An advantage of the productive approach is that it attempts to deal with the conflict while being cognizant of the relationship dynamics from which the conflict arises. If the batterer's motivation for coming to a conflict resolution process is to merely gain opportunity to perpetuate and prolong abuse, then any mediative type approach should stop and the conflict should be dealt with by a productive adjudicatory body. But the failure of the batterer to negotiate in good faith should not go unnoticed. The adjudicative body would be entitled to bring negative consequences to bear on the batterer, perhaps by reducing the burden of proof that the victim must meet, etc.

Additionally, before the couple could even begin a mediative type of process, their respective power would be assessed. As Gagnon has correctly stated:

> "equality of bargaining power and mutual co-operation do not exist in a battering relationship."[42]

In a context of battering one cannot proceed with an assumption of equal power and equal negotiation or communication skills. The productive approach does not do so. Power and skill disparities are considered directly and necessary access to empowering and enabling resources is organized.

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[41] Robert Geffner and Mildred Daley Pagelow, "Mediation and Child Custody Issues in Abusive Relationships" (1990) 8 *Behavioral Sciences and the Law* 151 at 155.

[42] Gagnon, *supra*, note 40 at 274-75.

This, admittedly, is a difficult process. In every intimate relationship couples develop their own methods of communication. Normally these modes of communication do not create a problem, however in the battering relationship:

> "As time goes on ... specific rules and their attached consequences give way to a general climate of increasingly subtle control, where the batterer needs to do less and less to structure his family's behavior. Caught up in the day to day fight for survival, the victims may not even be aware of this censorship process."[43]

With such a relationship dynamic in place it is difficult to discern the problem let alone solve it. However, the advantage of the productive approach is that it attempts to provide recourse to the information and expertise necessary to address the needs and interests of the parties. If the ability to recognize and express one's needs and interests is the very problem itself, then resources ought to be provided to the individual to help do so.

On this topic Gagnon has observed that:

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[43] Karla Fisher, Neil Vidmar & Rene Ellis, "The Culture of Battering and the Role of Mediation in Domestic Violence Cases" (1993) 46 *SMU Law Review* 2117 at 2129. The authors go on to state that: "battered women have been socialized over the course of their abusive relationship to pay attention to the abuser's needs and to denigrate their own ... Because self-censorship is internalized, physical separation from the batterer may not change her instincts to focus on the abuser's needs in the mediation session and not her own. Second, the oppression a battered woman experiences during the abusive relationship may impede either their ability to even know what her needs are, or her ability to speak about her needs in ways that can be understood by others." *Ibid.* at 2169.

> "If the mediator is not aware of a history of domestic violence or is not trained in the dynamics of domestic violence, it is unlikely that inequality of bargaining power will be addressed."[44]

In an adversarial process the idea is that the lawyer, and the procedural safeguards, will ensure an equality of bargaining power. However, the lawyer must take instruction from his or her client and if the lawyer is not trained in issues of domestic violence, the inequality of bargaining power will still not be adequately addressed. At most the impact of unequal bargaining power will be delayed until after the court proceedings are done. If the court did not consider what the battered individual needs to be free of abuse in the future, the result will be less peaceable and productive than it ought to have been.

A tragic example of the failure to properly recognize and deal with the dynamics of a battering relationship is related by Geffner and Pagelow. They write:

> "Numerous other factors mitigate against forcing or coercing an abused spouse into mediation with her abuser. The angry abuser may turn his fury against his wife, children, himself, and even against the mediator. In one case, for example, the abuser used his considerable charm to convince two mediators in three sessions that he was a loving father and husband while painting his wife as a rigid and unreasonable mother. The wife was too terrified of her husband to confront him in the mediation session with his past abuse. The mediators were unaware of his past violence against her and the children because court documents were not available to them before beginning mediation sessions. When the couple returned to court, he became upset and stormed out of the courtroom, telling his wife in the judge's presence that she would 'pay' for what she was

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[44] Gagnon, *supra*, note 40 at 280.

> doing. Two days later he shot all three sons and himself."[45]

The failure in this tragic case was not confined to the more informal process of mediation, it extended into the courts. Neither process, in this case, included steps necessary to protect the parties involved or look after their needs and interests. The woman in this case obviously needed help in discussing her needs and interests. The man just as clearly needed help and counselling to deal with his homicidal and suicidal behaviour.

A productive approach would not presume to claim that it would, as a matter of course, have prevented the deaths of the man and his sons. However, what the productive approach can support is the idea that the man's attitudes may have been less likely to have developed if he had lived in a culture that views and resolves conflicts productively. In the current system that solves problems adversarially, the man, faced with what he must have believed to be the biggest problem he had ever faced, chose the ultimate adversarial act to deal with it.

It has been said that:

> "Mediation is billed as an empowering, transforming process for the parties in which each participates equally. The mediator is charged with rectifying power imbalances, but, within a culture of battering, correction of power imbalances is unlikely if not impossible."[46]

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[45] Geffner, *supra*, note 41 at 156.

[46] Fisher, *supra*, note 43 at 2172.

In the discussion herein, the productive approach is also being billed as an empowering, transforming process. Hopefully, the authors of the above quotation are wrong in the conclusion they draw. If the correction of power imbalances in a culture of battering is impossible, then the victim is condemned to a situation where there can be no hope for growth; and, perhaps, no hope at all. Advocates of the productive approach cannot accept this. While not denying the subtlety and seriousness of a culture tolerant or supportive of crimes like battering, advocates of the productive approach still assert that it is a worthwhile endeavour to go beyond legal issues and make efforts to provide information and resources to a victim which will help her begin to grow out of her disempowered condition. Though the possible gains may be small, they are worth pursuing nonetheless.[47]

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[47] It has been stated that: "Even in the rare instance that mediators recognize the seriousness of abuse in a battering relationship and attempt to balance the power between the parties, this compensation is inadequate ... even the notion that power which has been grossly imbalanced over the course of an entire multi-year relationship can be shifted within a two hour mediation session minimizes the seriousness of the impact of the abuse on battered women. Balancing the power means that the weaker party can arrive at the point where she is free to express her needs to the other ... fear of the consequences may prevent the battered woman from doing so because voicing her needs is tantamount to 'rebellion' in the eyes of the abuser ... Nor should it necessarily be the goal of mediators to assist battered women in 'moving beyond' their fear. Rooted in prior experience, their fear is not irrational. Mediation cannot promise to protect battered women from the abuse that might result from expressing their needs, which does not facilitate the creation of a safe environment where they can actually do so." *Ibid.* at 2168.

The productive approach does not want to minimize the problems of the person who has suffered years, perhaps a lifetime of abuse. To pretend that a few months, or even a few years, of productive conflict resolution will somehow give the abused individual power equal to that of the person's abusers may effectively minimize the person's problems. Therefore, what the productive approach does do is look for ways it can help the person grow while their conflict is being resolved. Rather than taking a dispute focused approach, which resolves isolated issues and then send the abused spouse on her or his way, the productive approach attempts to deal with the dissension in context and provide such productive input as is possible in the time allotted to the conflict resolution. It is not perfect, nor does it claim to be. It does not claim to solve all the ills of a violent society. What it does

In the concluding words of Geffner and Pagelow:

> "Mediation with abusive couples can only be accomplished successfully with the consent of both parties, with a mediator who is trained in both family violence and mediation techniques, with the use of particular methods to balance the power differential and compensate for the automatic advantage of the abuser, and in conjunction with the abuser's participation in therapy. When conducted properly with certain types of cases, mediation can not only help couples arrive at mutually satisfactory arrangements but it can also help empower the battered woman."[48]

It is on this, hopefully not overly, optimistic view that the productive approach would attempt to deal with power imbalances in general and as they occur in a culture of battering. To do so it will proceed in various forums ranging from mediation to adjudication, but regardless of the forum selected the needs and interests of the people remain paramount.

3.5 Comparing Open and Closed Justice Forums - The Problem of Prejudice

In an article entitled "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution",[49] Delgado et. al. address the concern that the deformalization of alternative dispute resolution mechanisms

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attempt to do is make strides toward the evolution of a peaceful and productive society.

[48] Geffner, *supra*, note 41 at 157.

[49] Richard Delgado *et al.*, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) 1985 *Wisconsin Law Review* 1359.

may increase the risk of prejudice.[50] To the extent that the productive approach lessens procedural requirements it must also consider the validity of such concerns and determine how it may respond to them.

In their survey of the literature on prejudice, Delgado et. al. recognize that there are a number of theories which attempt to explain prejudicial attitudes. Their summary is that:

> "it seems likely that no one theory can account for all forms of it. Several theories - psychodynamic, social-psychological, and economic - all play a part."[51]

From these theories they draw several points which they believe to be relevant to a discussion of justice systems and the handling of prejudice. It is their general conclusion that an adversarial and formal system of justice is better able to deal with prejudice than the more informal setting that one might see in mediation or in the productive approach. However, when one looks more closely at the reasoning they advance, it seems more likely that informal procedures could be equally if not more effective.

Delgado, et. al., begin their analysis of justice system response to prejudice by looking at the psychodynamic theory. They say that "Psychodynamic theories of prejudice look to personality traits and tendencies to explain why some individuals react with hostility to certain groups."[52] According to this theory, highly prejudiced persons have authoritarian personalities and are unable to be flexible or change their mental mind set. They want human relationships controlled with definiteness, finality and authority.[53] Additionally, groups may become the target of prejudice if they come into competition with the authoritarian individual.[54]

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[50] *Ibid.* at 1360.

[51] *Ibid.* at 1375.

What this commentary seems to give is a recipe for conducting oneself in the adversarial system of justice. Inflexibility, rigid mind-set, definiteness, finality, authority and competition, are all traits commonly associated with the adversary system. Despite this seemingly obvious parallel, the authors conclude that formal systems respond to prejudice better.

When Delgado et. al. turn to the social-psychological theory of prejudice they summarize the theory as saying that people learn whom to dislike, just as they learn other group values.[55] They go on to say that some of this learning is coercive and the pressures toward conformity are very real although very subtle.[56] "Dislike is accommodated by barriers to communication and by oversimplified, undifferentiated categorizations according to which all members of the out-group are the same."[57] They conclude by acknowledging that some theorists of this school think that prejudice is based less on physical difference than on lack of congruent belief structure.[58]

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[52] *Ibid*.

[53] *Ibid*. at 1376-7.

[54] *Ibid*. at 1377.

[55] *Ibid*. at 1380.

[56] *Ibid*. at 1380-81.

Delgado, et. al., acknowledge that the best way out of such prejudice may be equal status contact and the pursuit of common goals.[59] Conformity, barriers to communication, oversimplified and undifferentiated categorizations, and lack of similar beliefs, are hallmarks of the adversarial system. The cure, equal status and working together on a common problem, would appear to point to a productive approach.

Their summary of the conduct necessary to lessen prejudice concludes that:

> "three conditions must be met. First, equal status between the majority and minority groups must be present. Second, each group must see contact as rewarding, rather than threatening or antagonistic. Finally, contact must lead to individualization between participants; the contact must be intimate rather than casual or impersonal."[60]

It is arguable that both formal adversarial processes and productive approaches can meet the first criteria; thus, this would not appear to be a basis for distinguishing between preferable systems of justice.

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[57] *Ibid.* at 1381-82.

[58] *Ibid.* at 1382.

[59] *Ibid.*

[60] *Ibid.* at 1386.

As for the second requirement, it is difficult to see how both groups can see a formal adversarial process as rewarding and non-threatening. Each of them know, when going into the process, that only one will win. Further, antagonism is the heart of the partisan adversarial process. On the other hand, properly structured and utilized productive approaches can be rewarding and non-threatening for both parties. If the process is directed at mutual gain, and proceeds with such an end in view, the productive process does exactly what the second criteria demands.

With regard to the third criteria, only the productive approach is directed toward a consideration of how the individual's subjective beliefs impact upon the relationship dynamic. As for the intimacy of the process, it is baffling how Delgado et. al. can conclude that partisan advocacy is more intimate and that productive conflict resolution mechanisms are more impersonal.

Delgado, et. al., also go on to state that:

> "a prejudiced person is more likely to act in prejudiced fashion when on familiar ground or with friends than when participating in a public function."[61]

There may be an element of truth in this statement but the person of colour being pursued by the Ku Klux Klan in public spaces would be unlikely to see it. The key is not where the prejudicial action is carried out. Instead the key is whether the person is in a setting where they will be held accountable for their behaviour. A formal setting where the person can hide his or her prejudice behind the structured arguments of a lawyer gives less option for accountability than does a situation where a racially sensitive mediator holds the person directly accountable for his or her behaviour.

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[61] *Ibid.*

In fact, Delgado et. al. acknowledge the importance of confrontation, but don't appear to recognize that it is not the forum which provides confrontation but, rather, the way in which dissension resolution is conducted within the particular forum. They write:

> "In face-to-face settings the prejudiced person's attitudinal inconsistencies are brought to his or her attention. Confronting these inconsistencies causes unease and 'self-dissatisfaction' ... Our review of social-psychological theories of prejudice indicates that prejudiced persons are least likely to act on their beliefs if the immediate environment confronts them".[62]

Despite this observation, they fail to recognize that the passage applies to productive and alternative justice systems every bit as much, or perhaps more, than it does to a formal adversary process.

The baffling nature of their conclusions continues when one compares the following two passages from their work.

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[62] *Ibid.* at 1386-87.

The first passage reads:

> "In general, when a person feels 'he is the master of his fate, that he can control to some extent his own destiny, that if he works hard things will go better for him, he is then likely to achieve more ... That is, minority group members are more apt to participate in processes which they believe will respond to reasonable efforts."[63]

The second passage reads:

> "Thus, it is not surprising that a favoured forum for redress of race-based wrongs has been the traditional adjudicatory setting. Minorities recognize that public institutions, with their defined rules and formal structure, are more subject to rational control than private or informal settings ... Thus, a formal adjudicative forum increases the minority group member's sense of control and, therefore, may be seen as the fairer forum."[64]

To the extent that the traditional adjudicatory approach has been the approach of preference, how could it be otherwise when it was the only game in town. The authors' claims that the individual controls his or her own destiny in the adversarial forum are simply unsupported. The fact is that the ultimate control is in the hands of third parties, i.e. the judge, jury and lawyers. The only way that one can claim that the adversary setting has the monopoly on being subject to rational control is if one's rationality is in accord with the rationality of the adversary system. And, even for these people the "control" they exercise is usually through the intermediary efforts of their lawyer. For people who rationalize the world differently than those who guide the adversary system there is no rational control at all.

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[63] *Ibid.* at 1390-91.

[64] *Ibid.* at 1391.

3.6 The Capacity of the Productive Approach to Deal With Emotions Such as Anger

Another concern set forth by Grillo, relates to mediation's effectiveness at dealing with emotions. She is worried that expressions of anger are frequently discouraged in mediation, and states:

> "This discouragement of anger sends a message that anger is unacceptable, terrifying and dangerous. For a person who has only recently found her anger, this can be a perilous message indeed. This suppression of anger poses a stark contrast to the image of mediation as a process which allows participants to express their emotions ... anger may turn out to be the source of her energy, strength, and growth in the months and years ahead. An injunction from a person in power to suppress that anger because it is not sufficiently modulated may amount to nothing less than an act of violence."[65]

In response, first of all, the mediator, or any other justice system official, cannot allow one person to express anger while denying the opportunity to another. In many cases the weaker party will be more afraid of the anger of the stronger party than vice versa. Thus, to allow the free roaming expression of anger would only serve to further suppress the weaker party.

The problem with mediation that Grillo does identify in the above passage is a functional inability of the mediator to control anger productively. It is true that a woman's anger may give her energy in times ahead; however, the productive approach goes on to question the uses to which the anger will be put. If the mediator is still affected by the common view which sees conflict as negative, then efforts will be made to suppress the anger, to eliminate its expression.

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[65] Grillo, *supra*, note 21 at 1572-73.

What the productive approach facilitates is an evolution one step beyond the adversarial system. The conflict resolution process should recognize anger and avoid the negative expression of that anger. However, in doing so it should not lose the motivating force of the anger. What the productive approach seeks to do is to transform the energy of the anger into a force for productive change. What are the weaker party's interests and needs? How can the force of the anger push the weaker party toward the growth and fulfilment she or he wants? The idea is that the anger should not be cancelled but, instead, redirected into activities that will make a positive difference in the person's life.

From a productive vantage, it seems that anyone who does not wish to have power exercised over them should not seek to exercise it over others; anyone who does not want to suffer the negative consequences of someone else's anger should not seek to vent their wrath on another. For, if they believe that objective power and anger are undesirable they must be undesirable for all. If they say anger and objective power are good when in their own hands, then there should be no reason they are not good when in the hands of another. Fairness and productivity aren't about what you can do to others and not have done to you.

But, to be clear, the productive approach is not simply suggesting that the parties vent their anger and then forget it and move on.[66] As with other claims and demands, the productive approach tries to uncover the needs and interests that underlie the anger. It tries to find what the person hopes to accomplish through his or her anger. Then, it attempts to find ways to meet those needs directly, either with the energy of the anger or without it. Where the person is allowed to use their anger to strike out in vengeance, their anger will lose its potential to stimulate productive results.

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[66] Grillo is critical of a simple venting approach which she believes does not take anger seriously enough. She believes the venting approach fails to recognize the long-range impact on the party exposed to it. "If the privilege of expressing anger has not been distributed equally in the relationship prior to mediation, then the mediator should not grant that privilege equally during mediation." *Ibid.* at 1575. In other words the mediator should metaphorically hold the stronger person while the weaker person hits him or her. The productive approach cannot accept either the casual dismissal of anger or the attempt to even the scales of past abuse.

Chapter Six:

Conclusion

The adversarial system, in an evolving form, has existed for centuries. Many aspects of the system are valuable and should not be lost. Procedural fairness, due process, the search for truth and the promotion of equality, for example, are all valuable principles. However, if the evolution of the justice system is to continue, we must be prepared to examine custom in a critical light. The structure and approach of the adversarial system are not justified simply by virtue of the fact that they exist. To be suitable, the justice system ought to provide efficient means to meet the goals of peace and productivity. The adversarial system does not do so.

The belief that it is valuable to seek the truth, ensure justice and protect rights, is shared by advocates of the adversarial system and advocates of a more peaceful and productive conflict resolution system. However, the productive approach differs from the adversarial system in the way it views truth, justice and rights.[1] Within the productive approach, truth, justice and rights are all seen to have a tripartite nature, composed of subjective, relational and objective elements. The atomistic and combative premises at the core of the adversarial system would appear to be inconsistent with the attainment of tripartite values.

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[1] See Chapter Three, Parts 7-9.

Supporters of a productive conflict resolution approach accept the need for laws of general application and rules of fair procedure; however, they seek to transfer these laws and procedures into a justice system based upon a productive model. Such a method recognizes and incorporates an evolved view which sees conflict as an opportunity for growth and enablement rather than a prelude to aggression and the risk of loss. The way we, as a society, evolve our handling of conflict is a matter of deliberate choice. While it may be impossible to eliminate conflict, and undesirable to attempt to do so, we can seek to transform the way we deal with it into something which better serves the societal goals of peace and productivity.

A justice system following an interest-based approach to conflict resolution, focused directly on needs and interests is possible. By implementing such a system, it is hoped that all individuals - regardless of race, class, gender, culture or other difference - may be seen as having different, but not less valuable, potential for growth. Further, respect for difference, and incorporation of difference, will both be enhanced by such a process. The focus of the productive approach (i.e. on resolving conflict through an exercise of relational and subjective power) provides a direction that may facilitate this respect and incorporation of difference.

With a plural, and increasingly global, society it is no longer realistic for one to see oneself as an isolated individual. People are both individual and social in nature; and, one's encounters with others shape and even create the world one lives in. With the relational understanding of autonomy in the productive approach, if individuals are to be enabled to find and live in accordance with their own law, then efforts must be made to return people to their own decision making.[2] But, in doing so, the productive conceptualizations of decision making in the face of conflict require individuals to make their decisions through a relational power dynamic.

For these reasons, the evolution of a peaceful and productive approach to conflict resolution lies beyond the adversarial system.

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[2] As discussed in Chapter Three, Part 3.

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